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No. 100

In the Supreme Court of the United States

OCTOBER TERM, 1957

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 73–79) is reported at 241 F. 2d 631. The opinion of the District Court in the *Green* case (R. 66–71) is reported at 140 F. Supp. 117.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1957 (R. 73). On February 21, 1957, an order was entered by Mr. Justice Harlan extending the time for filing a petition for a writ of certiorari to April 12, 1957. The petition was filed on April 9, 1957, and certiorari was granted on May 27, 1957 (R. 80). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

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QUESTIONS PRESENTED

1. Whether the evidence adduced at the hearings was sufficient to sustain the court's finding that petitioners knowingly and wilfully disobeyed an order of the District Court.

2. Whether petitioners' wilful disobedience of the order of the District Court, requiring them to surrender from enlargement on bail after affirmance of their convictions, constituted contempt.

3. Whether the trial court had the power to sentence petitioners to terms in excess of one year for criminal contempt.

4. Whether the trial court abused its discretion in sentencing petitioners to imprisonment for three years, where they had defied the order of the District Court by remaining fugitives from justice for more than four years.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent constitutional provisions, statutes, and rules are set forth in the Appendix, *infra,* pp. 82–88.

STATEMENT

These proceedings arose in the United States District Court for the Southern District of New York, upon the application of the United States Attorney for an order requiring the petitioners to show cause why they should not be adjudged guilty of contempt of the court for disobedience of, and resistance to, an order of that court, pursuant to the provisions of 18 U. S. C. 401 (3) (*infra,* p. 82) and Rule 42, Federal Rules of Criminal Procedure (*infra,* pp. 87–88).

Prior to the hearings under the order to show cause, petitioners were served with "Specifications of Criminal Contempt" (R. 4), which charged them with wilfully and knowingly disobeying an order of the District Court. The hearings were held on March 12 and March 26, 1956. Judge Dawson, sitting without a jury, found the petitioners guilty of contempt of court as charged, and sentenced each to three years' imprisonment (R. 38). On appeal to the Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 79), Judge Learned Hand writing the opinion for a unanimous court (R. 74).

The pertinent facts are as follows:

In 1949, petitioners and nine others—the so-called *Dennis* defendants—were convicted in the District Court of conspiracy to teach and advocate the violent overthrow of the United States Government, in violation of Sections 2 and 3 of the Smith Act (now 18 U. S. C. 2385). On October 21, 1949, petitioners were each sentenced to five years' imprisonment and to pay a fine of $10,000 (R. 44–45, G. Ex. 1). Pending appeal from these judgments of conviction, by order of the Court of Appeals for the Second Circuit dated November 2, 1949 (R. 46, G. Ex. 2), each petitioner was released on bail in the amount of $20,000 (which sums were supplied by an organization known as the Civil Rights Congress). The recognizance under which they were released was conditioned, *inter alia*, upon their surrender "in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the South-

ern District of New York may direct, if the judgment and sentence appealed from shall be affirmed" (R. 55–56, G. Ex. 3).

On August 1, 1950, the convictions were affirmed by the Second Circuit (*United States* v. *Dennis*, 183 F. 2d 201), following which the Court of Appeals entered an order revoking bail, but staying its execution for thirty days to permit an application for continued bail to be made to this Court. Subsequently, Mr. Justice Jackson continued the petitioners' bail pending their application for a writ of certiorari (*Williamson* v. *United States*, 184 F. 2d 280). Thereafter, a petition for the writ was duly filed and granted (340 U. S. 863).

On June 4, 1951, this Court affirmed the convictions (*Dennis* v. *United States*, 341 U. S. 494), and on June 22, 1951, Mr. Justice Jackson denied a requested stay of mandate (R. 8).

On Thursday, June 28, 1951, Harry Sacher, an attorney of record in the *Dennis* case, accepted service, on behalf of petitioners and the other *Dennis* defendants (R. 60), of a "Notice of Settlement" (R. 57–58) and an accompanying proposed "Order on Mandate" (R. 59–60) requiring the surrender of petitioners and their codefendants on the following Monday, July 2, 1951, to begin service of their sentences. The "Notice of Settlement" directed counsel to "[p]lease take notice that the within Order on Mandate will be presented for settlement and signature" to the District Court on July 2, 1951, at 10 a. m. (R. 57). Under the terms of the proposed "Order on Mandate," each *Dennis* defendant was directed to

"personally surrender to the United States Marshal for the Southern District of New York, in Room 318, United States Court House, Foley Square, New York, N. Y., on the 2d day of July, 1951, at 11:05 o'clock in the forenoon of that day" (R. 59–60).

On the following day, Friday, June 29, 1951, Mr. Sacher, on behalf of petitioners and the other *Dennis* defendants, requested the United States Attorney, Irving Saypol, "to allow these men to spend the last holiday, which would be available to them for some years, to being with their wives and children," and suggested to him that "it would be ironical for the United States Attorney to decline that kind of a last wish, so to speak, on the eve of Independence Day" (R. 11). This request was apparently denied (see fn. 1, *infra*). Mr. Saypol, however, according to Mr. Sacher, "suggested that we come before" District Judge Ryan about the matter (R. 11). Accordingly, Mr. Saypol and Mr. Sacher appeared before District Judge Ryan later that day (Friday, June 29, 1951), at which time Mr. Sacher made certain "motions" (R. 9), following which proceedings were continued to the following Monday, July 2, 1951.[1]

---

[1] The record is not clear as to the precise nature of the "motions" which Mr. Sacher made to Judge Ryan at this session on June 29th. Presumably they dealt with his request, previously made to Mr. Saypol, that the *Dennis* defendants be permitted to spend the Independence Day holiday with their families. The transcript of record in this Court in the related case of *Hall* v. *United States*, No. 471, Oct. Term, 1952, pp. 27–28, reflects the following colloquy between Judge Ryan and Mr. Sacher (at the *Hall* contempt hearing of November 21, 1951) as to what transpired at this court session of Friday, June 29th:

"The COURT. * * * My recollection of the facts was that I

Still later on June 29th, following the proceedings before Judge Ryan, Mr. Sacher went to Communist Party Headquarters, 35 East 12th Street, New York City, where he consulted with all of the *Dennis* defendants, with the possible exception of one (Thompson) (R. 9-10). At a hearing before Judge Ryan on the following Tuesday (July 3, 1951) to ascertain the circumstances surrounding the failure of petitioners and their co-defendants, Hall and Thompson, to surrender for commitment on July 2nd (see *infra*, p. 8), Mr. Sacher testified as follows (*ibid.*):

> The COURT. Did you tell them at that time [June 29th] that their presence was required in court yesterday morning?
>
> Mr. SACHER. Definitely. As a matter of fact I advised that because I think I saw them

---

think on the Friday preceding this Monday I had appeared in court; there were stenographic minutes taken at the time, and I think you were in court on that Friday afternoon.

"Mr. SACHER. I was, your Honor.

"The COURT. And I then was asked by the United States attorney to make a direction that the defendants appear at a certain time on Monday. The mandate had not as yet been received and my recollection is—the minutes will show whether I am correct or not—that I said that since the mandate had not been received and filed in this court, that I felt I was without jurisdiction to make such an order. However, I think I received some assurance from counsel that the defendants would be present in court Monday, and at that time I would hear arguments on motions which had been made with reference to the sentence imposed on one or two of these defendants."

The *Hall* transcript further reflects that Mr. Sacher, in the following language, personally assured Judge Ryan at that time that all of the *Dennis* defendants would be present in court on the following Monday (*id.*, pp. 58, 59):

"You have my word that all of these defendants will be here at that time."

among other defendants after I had been here on Friday, your Honor, and had made these motions, and therefore I advised that they all should be present and I was assured they would be.

The COURT. By them?

Mr. SACHER. Yes, by all of the defendants.

The COURT. That is, that all defendants would be here.

Mr. SACHER. That's right.

The COURT. But you don't know where they are?

Mr. SACHER. Really don't.

The COURT. And you personally told them to be here Monday and they assured you that they would be here, with the exception of the one defendant, Green?

Mr. SACHER. No, Thompson.

Mr. Isserman, the attorney for petitioner Green in the *Dennis* case, informed Judge Ryan at this same hearing on July 3rd (R. 10):

> * * * I was with Mr. Sacher on Friday when there was some discussion of the illegality or the alleged illegality of the notices that were served, and I recall Mr. Sacher saying that notwithstanding that, he would recommend strongly that all defendants be present on Monday morning, and such assurance was given. I remember, Green being my client, I remember distinctly that I saw him on that day and received from him the assurance that he would be here Monday morning.

On Monday morning, July 2, 1951, seven of the eleven *Dennis* defendants appeared in court before Judge Ryan together with government and defense

counsel, and Judge Ryan signed the above-noted (*supra*, pp. 4–5) "Order on Mandate" requiring all of the *Dennis* defendants to surrender for commitment on that day at 11:05 a. m. (R. 59–60). Petitioners, however, failed to appear as ordered by the court, either on that day (R. 12) or at any time thereafter until their surrender nearly five years later (see *infra*). As a result of their failure to appear, their bail bonds were declared forfeited (R. 12) and bench warrants were issued for their apprehension (R. 7). Attempts to execute these warrants proved of no avail, however, and petitioners remained fugitives from justice until their surrender in 1956.

On Tuesday, July 3, 1951, Judge Ryan held a hearing to inquire into the circumstances of the failure of petitioners and their co-fugitives Hall and Thompson to surrender for commitment (R. 8–11). It was at this hearing that Mr. Sacher and Mr. Isserman gave the testimony set out above.

Although diligent efforts were made to apprehend petitioners, they remained in hiding for more than four years. On February 23, 1956, petitioner Green sent a signed statement to New York newspapers, marked "For Immediate Release," announcing that he would surrender himself to commence the service of his sentence "[o]n Monday, February 27th at 12 noon" (R. 64–65, G. Ex. 9). His announcement reads in part as follows (R. 64–65):

> On Monday, February 27th at 12 noon I shall cease being a fugitive from injustice and instead become its prisoner. At that time, I shall appear at Foley Square.

> The reason I am taking this step is that the main trend of the nation is no longer toward a new world war and McCarthyism. A new trend is evident. * * *
>
> New political winds are blowing. These give hope that the curtain of fear behind which democratic liberties were undermined and destroyed will be lifted. * * *
>
> The course I chose five years ago was not dictated by personal considerations. In many ways its was harsher than that of imprisonment. It meant added hardship and suffering both for myself and my family. It entailed not only cruel separation, but the greater agony of complete severance from loved ones.
>
> And yet, so long as there was a grave danger that this country would be dragged into a senseless world slaughter and toward an American brand of fascism, it seemed incumbent upon me to resist that trend with every ounce of strength I possessed. Some could do so by going to jail; others by not.
>
> * * * * * *
>
> I enter prison with head high and conscience clear. * * *

On February 27, 1956, in accordance with his announced intention, *supra*, Green surrendered (R. 15). A filmed interview of the event was conducted by Gabe Pressman, a roving reporter for WRCA-TV (R. 19). In the course of this interview, the following colloquy occurred between Pressman and Green (R. 15–18):

> **Q. Mr. Green, can you tell us why you decided to give yourself up?**

A. Because I think the political climate in the country is changing. * * *

* * * * *

Q. Where were you during these five years?

A. I was in Peoplestown, U. S. A. Where Peoplestown is you will have to determine for yourself. It was north of the Rio Grande and south of the Canadian border.

* * * * *

I believe that was the best way to indicate to the country that it was necessary to resist the trend of McCarthyism and towards world war.

* * * * *

Q. Do you expect an additional penalty for having jumped bail?

A. You'll have to speak to Mr. Brownell on that score.

* * * * *

Q. What made you jump bail?

A. I've tried to tell you that before. I thought that was the way by which I as an individual could do my best to help the cause for peace and democracy.

* * * * *

Q. Mr. Green, do you think that it is a good policy to follow for people who feel that they have been unjustly treated in the courts to take the law into their own hands and jump bail?

A. I am not ready to generalize on that. I'd say that the best kind of policy for the nation would be to live up to its own Constitutional Bill of Rights and not to sentence men and women unjustly.

A few days later, on March 1, 1956, petitioner Winston publicly announced that he too would sur-

reader to the authorities to start service of his Smith Act sentence (R. 39-42). In a signed "Announcement" to the International News Service, marked "For Immediate Release to All Newspapers," he announced that he would surrender at the United States Marshal's Office, Foley Square, New York, "this coming Monday, March 5th, 12:30 p. m." (R. 39, 42). This "Announcement" read in part as follows (R. 40-41):

> I was compelled to ask myself, as did all Americans opposed to the stampede toward world war and McCarthyism: How could I best serve the interests of the nation and help arouse its people to fight more determinedly for the Bill of Rights against those who were spreading the false gospel of inevitable war? I chose the path I did as my method of struggle against a growing fascist menace. * * *
>
> * * * * * *
>
> Reiterating my innocence and protesting the flagrant miscarriage of justice in my case, I now enter prison * * *.

Thereafter, the instant contempt proceedings were instituted, charging petitioners with knowingly and deliberately disobeying and resisting the July 2, 1951, order of Judge Ryan requiring them to surrender to begin serving their sentences for violation of the Smith Act (R. 1). The trial court (Dawson, D. J.), in finding petitioners guilty on the basis of the above-summarized evidence, found that, with knowledge of the order of Judge Ryan, they had absented themselves, remained in hiding, and failed to surrender to the United States Marshal, and that these acts were

done deliberately and intentionally (R. 22-23). The court held that, as a matter of law, this conduct constituted criminal contempt of court, to wit, wilful disobedience of a lawful order of the court requiring petitioners to surrender to start serving their sentences (*ibid.*).

SUMMARY OF ARGUMENT

I

The evidence supports the District Court's finding that petitioners had notice of the order which they were found guilty of disobeying.

The evidence compelled the inference that petitioners well knew, on June 29, 1951, that this Court had affirmed their Smith Act convictions on June 4th, and had on June 22nd refused to stay its mandate; that the time for them to start serving their prison sentences was, accordingly, imminent; that there was then in existence, prepared for the signature of a judge of the District Court, a proposed "Order on Mandate" requiring their surrender on July 2nd; that, through their attorneys, they had been served with a "Notice of Settlement" advising that the proposed order would be presented to the District Court "for settlement and signature" at 10 a. m. on the latter date; and that the United States Attorney had refused a request, presented by Attorney Sacher, that the presentation of the proposed order to the court for signature be deferred until after the Fourth of July holiday.

The evidence further established that both petitioners assured Mr. Sacher on June 29th that they would be present in court on the morning of July 2nd.

at which time they had every reason to believe they would be forthwith ordered committed to start serving their sentences; that, notwithstanding this, they fled from justice and remained in hiding for more than four years; and that, when they finally surrendered, it was to the accompaniment of public announcements which plainly showed knowledge that they had been fugitives throughout this period. These declarations strikingly disclose that one of the purposes of petitioners in taking flight was to advertise their opposition and resistance to the court which had tried and sentenced them. If they knew, as they did, that they were fugitives, they must have known, by the same token, that their enlargement on bail had been terminated by order of the court. For, according to the terms of the recognizance, termination of bail would occur on such day as the District Court directed. Their own statements thus provide eloquent support for the conclusion that they were aware that the direction had taken place.

The authorities fully support the view that one who knows that an order is about to issue against him cannot avoid its consequences by absconding at the moment when it is about to be formally entered.

II

The District Court had the power to punish as criminal contempt petitioners' disobedience of the order requiring them to surrender for commitment.

A. Petitioners have been convicted, not of bail-jumping, but of wilful disobedience of a formal court order. Since the pertinent statutory language—de-

fining and punishing as contempt of court disobedience to a lawful "writ, process, order, rule, decree, or command" (18 U. S. C. 401 (3)) is clear on its face, there is no occasion to resort to the statute's legislative history for additional light as to its meaning. But even were it otherwise, there is nothing in that history to support petitioners' contention that the courts have no power to punish as contempt the disobedience of an order requiring a convicted defendant who has been free on bail to surrender for commitment.

The history of 18 U. S. C. 401 shows that, while it was the purpose of the Act of March 2, 1831, from which Section 401 derives, to limit the power which had been claimed by certain federal courts to punish particular types of allegedly contemptuous conduct (especially out-of-court libelous criticism of a court's opinion by a stranger to the proceedings), it has never been doubted that the direct disobedience of a court order is punishable by the court as a contempt. To the contrary, the managers of the impeachment of Judge Peck (whose sentencing of Lawless for contempt was the occasion of the enactment of the 1831 Act) expressly accepted the power of courts to enforce obedience to their own orders through the processes of contempt.

B. Nor is there any valid historical basis for carving an exception from the word "order" for cases involving disobedience of orders to surrender to judicial custody. An order to surrender is but one variety of mesne process; since early common law, acts of disobedience to such process have been punished

through contempt proceedings. Obstruction to judicial processes results from disobedience of an order to surrender no less than from disobedience of any other kind of order, *e. g.*, disobedience of a subpoena.

The dearth of reported cases of the particular type of contempt here involved has a ready explanation. The ordinary bail bond or recognizance does no more than establish the conditions upon which bail shall become forfeit. A violation of those conditions establishes basis for forfeiture of the security but will not normally provide a foundation for charging wilful disobedience of a specific order. The circumstance that violation of a specific order can be laid at the door of these petitioners may make this case unusual on its facts; it scarcely makes it unusual in principle, for the principle is one common to all cases of wilful disobedience of court orders. It cannot reasonably be contended that persons who, like petitioners, having been duly convicted of crime and having had their sentences affirmed by the highest court of the land, proceed to disobey the specific command of the trial court that they surrender for commitment, are to be deemed less contumacious, albeit they continued to flout the court's order for more than four years, than a witness who fails to answer a subpoena or a party who fails to comply with an order to produce a document.

III

The District Court had the power to sentence petitioners to terms in excess of one year.

A. The punishment provision of 18 U. S. C. 401 is not ambiguous. It confers on all federal courts the

power to punish contemptuous conduct by fine or imprisonment, the *quantum* being unlimited by any statutorily imposed maximum. The sole qualification to be implied is that the power must be exercised reasonably and not arbitrarily. This interpretation of the statute has the support of the common law and of an unbroken line of federal decisions in this country, including decisions by this Court. As Circuit Judge (later Chief Justice) Vinson observed in *Warring* v. *Huff*, 122 F. 2d 641, 642 (C. A. D. C.), "the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge."

B. Nothing in the "prevailing usage" clause of Section 24 of the Clayton Act (now 18 U. S. C. 402, par. 3) justifies placing a one-year maximum on prison sentences for criminal contempts of court.

1. The statutory context, as well as the legislative history, of the "prevailing usage" clause of Section 24 of the Clayton Act shows that its purpose was to make clear that the *procedure* for punishing contempts of types other than that defined by Section 21 (which created a special class of contempts—disobedience of court orders where the contempt is also a criminal offense under federal or state law—triable, upon the accused's demand, by jury) was to continue as in the past, *i. e.*, that such contempts were to continue to be punishable by the court without a jury. There is no basis whatever for supposing that Congress intended that the clause should have anything to do with the amount of punishment imposable for such contempts. Indeed, both the scheme and history of the law affirmatively evidence the contrary.

2. In any event, the courts did not consider themselves limited to a one-year maximum sentence in criminal cases prior to the enactment of the Clayton Act. There are at least two reported American cases, antedating the Clayton Act, in which a sentence in excess of one year was imposed for criminal contempt, and it is indisputable that there has never been a common law usage limiting sentences for criminal contempt. Moreover, none of the pre-Clayton Act decisions involving sentences of a year or less indicate that the courts thought that one year was the maximum which they might impose. On the contrary, the decisions indicate that the courts fully appreciated that there was no maximum prison sentence for contempt.

3. Furthermore, even if the "prevailing usage" clause were pertinent to the issue of the power of a court to sentence for contempt to a term longer than a year (which we dispute), the *relevant* "prevailing usage" clause would not be that of the Clayton Act's Section 24 (which was repealed when the 1948 Criminal Code was enacted into positive law), but the comparable clause of 18 U.S.C. 402, par. 3, which was enacted as positive law in 1948. By that date, there had been numerous instances of federal contempt sentences exceeding one year.

C. Rule 7 ("The Indictment and the Information") of the Federal Rules of Criminal Procedure, providing that an offense punishable for a term exceeding one year or at hard labor must be prosecuted by indictment and that any other offense may be prosecuted by indictment or information, has no application to criminal contempts; the procedure for punishing the latter

is governed exclusively by Rule 42 ("Criminal Contempt"). Hence, petitioners argument (based on Rule 7) that if contempt is punishable by imprisonment for more than one year it must be prosecuted by indictment is unsound. Indeed, on petitioners' assumption that Rule 7 is applicable, *all* contempts would have to be prosecuted by indictment or by information—a result which would leave no room for the procedures set forth in Rule 42.

D. The power to punish criminal contempt by a term of imprisonment in excess of one year does not conflict with the requirement of the Fifth Amendment that infamous crimes must be prosecuted only upon indictment by a grand jury. The premise of petitioners' argument that there is such a conflict is that contempt is a crime in the constitutional sense. If that premise be sound (which we deny), the logic of petitioners' argument carries far indeed, for, in that event, the constitutional right of trial by jury applies equally. That right does not extend to felonies alone, but to most misdemeanors as well, the only exceptions being those offenses which come within the narrow category of "petty offenses." This would mean, at a minimum, that the innumerable criminal contempt cases involving imposition of substantial fines (*e. g., United States* v. *United Mine Workers*, 330 U. S. 258) or imprisonment for more than six months (*e. g., Savin, Petitioner*, 131 U. S. 267 (one year)) were proceedings conducted in disregard of constitutional rights.

1. But petitioners' premise ignores the historically unique status of the offense of criminal contempt.

Contempts have never been classed in this country, as in the case of other types of criminal offense, as either "felonies" or "misdemeanors"; they have always been regarded as *sui generis*. "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offense have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Myers* v. *United States*, 264 U. S. 95, 104–105; *Blackmer* v. *United States*, 284 U. S. 421, 440. Accordingly, trial of contempts by the courts does not violate Article III or the Sixth Amendment, guaranteeing the right to trial by jury in all criminal prosecutions. *In re Debs*, 158 U. S. 564, 594. By the same token, a contempt is not, and has never been considered, a "crime" within the meaning of the Fifth Amendment. The necessary consequence of adopting petitioners' view would be the anomaly (as observed by Judge Hand below) that contempt proceedings, if the punishment may exceed a year's imprisonment, must be begun by a grand jury, although such proceedings need not be tried to a petit jury.

2. Nor is there basis for petitioners' claim, in the generalized form in which they state it, that the admittedly settled rule holding criminal contempts not to be "criminal prosecutions" within the jury-trial requirement of the Sixth Amendment "rests on an historical error" (Br. 38). While there is basis for saying that constructive contempts (*e. g.*, libels upon the court) committed by strangers to a proceed-

ing were not tried to the court in early (pre-eighteenth century) times, it appears that disobedience of the writs and orders of the King's courts (as, also, contempts in the face of the court and contempts by officers of the court) were punishable from early times without indictment or jury trial. The "historical error" of Mr. Justice Wilmot—that the summary punishment of all types of contempts rested upon "immemorial usage" rather than eighteenth-century English practice—was thus an error only in the generalized form in which he stated the matter. So far as contempts consisting of disobedience to court orders or processes are concerned—the type of contempt involved here—there is no basis for the suggestion that trial by the court itself, without the intervention of a jury, was an eighteenth-century innovation in English law.

Wilmot's error—his assumption that immemorial usage gave foundation for the trial of constructive contempts by the court—is not a live question in the federal courts. The Act of 1831, as interpreted in *Nye* v. *United States*, 313 U. S. 33, 49, put it beyond the judicial power to punish as a contempt an obstruction of justice taking place outside the immediate vicinity of the court. But the same Act of 1831, like its successors, fully preserves the power to punish as a contempt the disobedience of court process and orders. This power has historical support (as shown by Fox, Beale and others) not only in the eighteenth-century practice known to the framers, but also in the practice at early common law.

IV

Petitioners' sentences of three years' imprisonment were within the permissible discretion of the District Court.

After taking advantage of every procedural remedy and every avenue of appeal permitted defendants accused of crime under our laws, and after their convictions had been sustained following a full hearing by this Court, petitioners elected to take the law into their own hands and to ignore the final order that they surrender to start serving their sentences. Their conduct in absconding and in violating the order to surrender for over four years required punishment which would effectively demonstrate that such efforts to make a mockery of the judicial process would not be tolerated.

Considering the flagrancy of the contempt, the protracted period during which it continued and the fact that, even on the eve of surrender, petitioners chose to renew their attacks on the courts which had convicted them, it must be concluded that the offenses were grave and that there were no mitigating circumstances.

Today, by statute, petitioners would be punishable for such an offense as they committed by five years' imprisonment or a $5,000 fine, or both. The penalty imposed here can thus hardly be deemed excessive under these statutory standards.

ARGUMENT

I

THE EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT PETITIONERS HAD NOTICE OF THE ORDER WHICH THEY WERE FOUND GUILTY OF DISOBEYING

Petitioners urge (Br. 12–21) that their convictions cannot be sustained because there is no evidence that they "had knowledge of the existence of the order which they were convicted of 'knowingly disobeying'" (Br. 12). We submit, however, that the evidence adduced before Judge Dawson fully warranted the inference which he drew (R. 42, 67): that both petitioners were well aware of the existence of the order in question.

From the evidence, as summarized *supra*, pp. 3–11, and taking into consideration that petitioners, during the period immediately prior to their scheduled appearance in court on July 2, 1951, were being kept advised of developments in their case by the *Dennis* attorneys, Messrs. Sacher and Isserman (*supra*, pp. 6–7), Judge Dawson was warranted in concluding that petitioners, on Friday, June 29, 1951, were well aware of the following facts: (1) that this Court had, on June 4th, affirmed their Smith Act convictions, and on June 22nd refused to stay its mandate, so that the time for them to start serving their prison sentences was imminent (*supra*, p. 4); (2) that there was then in existence, prepared for the signature of a judge of the District Court, a proposed "Order on Mandate," requiring their surrender to the United States Marshal, in Room 318 of the United States Court House at Foley Square, New York, on Monday, July 2, 1951

(*supra*, pp. 4–5); (3) that they, through their attorneys, had been served with a "Notice of Settlement" advising that this proposed "Order on Mandate" would be presented to the District Court "for settlement and signature" on that date, at 10 o'clock in the morning (*supra*, p. 4); and (4) that Mr. Sacher's request to the United States Attorney, Mr. Saypol, that he defer moving the court to enter its "Order on Mandate" until after the Fourth of July holiday, had been refused (*supra*, p. 5).

The evidence also established that on June 29th, following his appearances before Judge Ryan, Mr. Sacher "[d]efinitely" told petitioners that "their presence was required in court" on the morning of July 2nd; that both assured Mr. Sacher that they would be present in court at that time; and that Green, in addition, following "some discussion of the illegality or the alleged illegality of the notices [*i. e.*, the "Notice of Settlement"; see *supra*, p. 4] that were served," personally assured Mr. Isserman, his personal attorney, that he would be present in court at that time (*supra*, pp. 6–7). The evidence further established that, notwithstanding these personal assurances and their knowledge that they were required to be present in court on the morning of July 2nd, at which time they had every reason to believe they would be ordered committed to commence service of their sentences, they did not appear on that day or at any time thereafter prior to their surrender more than four years later (*supra*, pp. 7–8); and that, when they finally did surrender, it was to the accompaniment of public announcements which plainly showed knowledge that

for the preceding four years they had been fugitives from justice (*supra*, pp. 8–11). Petitioner's declarations were unquestionably admissible as admissions against interest. On their face, these declarations strikingly disclose that one of petitioner's purposes in taking flight was to advertise their opposition and resistance to the court which had tried and sentenced them. If petitioners knew that they were fugitives—which they are in no position to deny—they must have known, by the same token, that their enlargement on bail had been terminated by order of the court.[2] For, according to the terms of the recognizance (*supra*, pp. 3–4), termination of bail would occur on such day as the District Court directed. Petitioners' own statements thus provide eloquent support for the conclusion that they were aware that the direction had taken place.

The above-summarized evidence, which petitioners made no effort to challenge or explain, compels the conclusion that petitioners knew, at some point during the prolonged period that they were in hiding, if not on the very day of July 2, 1951, that the order which they had every reason in the world to expect had in fact issued.[2] That knowledge, coupled with the admitted fact of their four years' flight from justice, fully sufficed to support the finding of guilt.

[2] This Court may judicially note that the newspapers of the nation gave prominent notice to the absconding of petitioners and the court proceedings of July 2nd, including Judge Ryan's signing of the order on that date requiring petitioners' surrender. See, *e. g.*, the *New York Times* of July 3, 1951, p. 1, col. 1, and the *Daily Worker* of the same date, p. 1.

2 Daniell, *Chancery Pleading and Practice* (4th Amer. ed., 1871), p. 1684, which petitioners cite as an authority in their favor (Br. 17), is actually against them. "In some cases," according to this writer, "a committal may be ordered, where neither the writ [of injunction] nor the minutes of the order have been served, nor any personal notice given. Thus, it was held by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice; *and if the party remains in Court, until the order is about to be made, he cannot, by leaving at that instant, avoid its consequences*" (emphasis added). Although the instant case involves an order rather than an injunction, the thrust of the passage is no less plain. Petitioners, in the days immediately preceding July 2, 1951, did not merely have a growing suspicion or fear that an order directing them to go to prison might issue against them. This Court having already affirmed their convictions and refused a stay of mandate, they *knew* that the order for their commitment was both certain and imminent. Accordingly, they could not, by taking flight on the eve of the entry of that order, "avoid its consequences."

See, also, the comment following immediately after the above-quoted passage (2 Daniell, *loc. cit.*, pp. 1684-1685):

"* * * So, also, if he is informed that the injunction has been granted, and there will be no delay on the part of the [plaintiff] in order to get the order drawn up, the defendant will be committed for the breach of it; because it would be a contempt to act contrary to the [intended] order, when he knew the order was made. In this and the like cases, if the mischief

To the same effect as the above-quoted passage from Daniell (*supra*, p. 25), see 2 High, *Injunctions* (4th ed., 1905), §§ 1422-1423; *Skip* v. *Harwood*, 3 Atk. 564, 26 Eng. Reprint 1125 (Chancery, 1747); *Anon.*, 3 Atk. 567, 26 Eng. Reprint 1127 (Chancery, 1747); *Hearn* v. *Tennant*, 14 Ves. Jun. 136; 33 Eng. Reprint 473 (Chancery, 1807). In *M'Neil* v. *Garratt*, Cr. & Ph. 98, 41 Eng. Reprint 427 (Chancery, 1841), it was held that a person may be imprisoned for breach of an injunction even before the injunction issues, so long as he knows it is *going to* issue by virtue of his knowledge of the order for its issuance. This is also the rule in the United States: *Winslow* v. *Nayson*, 113 Mass. 411, 420; *Haring* v. *Kauffman*, 13 N. J. Eq. 397, 399; *Hutchins* v. *Munn*, 28 App. D. C. 271.

In *Pettibone* v. *United States*, 148 U. S. 197, this Court observed (at 206-207):

> In matters of contempt, persons are not held liable for the breach of a restraining order or injunction, unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued, or the order entered, *or at least that application is to be made*; but without service of process *or knowledge or notice or information of the pendency of*

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might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees * * *. *In short, the Court will not, under such circumstances, permit a man to elude its justice by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt* * * *." [Emphasis added.]

proceedings, a violation cannot be made out. [Emphasis added.]

Here, as we have seen, petitioners knew far more than that an application was to be made for an order for their commitment, and had far more than "information of the pendency" of proceedings looking to their commitment. They knew, on June 29, 1951, that the entry of such an order was, as we have said, both certain and imminent. See also *In re Lennon*, 166 U. S. 548, 554; *Radio Corp. v. Cable Radio Tube Corp.*, 66 F. 2d 778 (C. A. 2), certiorari denied, 290 U. S. 703.

In short, we submit that there was compelling evidence that petitioners knew of the existence of the order for their surrender, and that their flight from justice reflected a design to flout it. The Court of Appeals correctly summed it up in the *Hall* case, *supra*, 198 F. 2d at 730-731, decided on almost identical facts:

> On this record, therefore, we think the court was eminently justified in finding as a fact that respondent had complete notice of the order and willfully disobeyed it. The inference not only was well within the area permitted to a trier of facts, but was indeed one highly reasonable if not compelled. However heavy the evidential burden on the prosecution here, it can hardly be held more exacting than the "proof beyond a reasonable doubt" of an ordinary criminal case before a jury. We have been often pressed, but have consistently refused, to apply this formula to each link in the chain of alleged events in order that if as to any [illegible]

> proof is not thus overwhelming there must be a reversal of a verdict of guilt. Instead we have said that the process of drawing inferences is to be governed, as ordinarily, by human experience, that indeed no other rule of jury fact finding has a claim to reality, and that the strict requirement as to burden of proof constitutes an over-all admonition or warning, rather than a precise yardstick to be applied to each isolable segment of the proof. [Citing cases.] There can be little doubt but that a jury would have been permitted to make the rational inference made below. We think that a court must not be restricted beyond a jury or compelled to remain blind to so clearly intentional a flouting of its command as was here shown.

II

THE DISTRICT COURT HAS THE POWER TO PUNISH AS CRIMINAL CONTEMPT PETITIONERS' DISOBEDIENCE OF THE ORDER REQUIRING THEM TO SURRENDER FOR COMMITMENT

Petitioners contend that at common law and under Section 17 of the Judiciary Act of 1789, 1 Stat. 83, courts were without power to punish through contempt proceedings the disobedience of orders requiring convicted defendants to surrender for commitment, and that therefore they are without power to do so under 18 U. S. C. 401, the lineal descendant of that section of the first Judiciary Act (Br. 21-26). We submit that the argument is without merit.

A. Petitioners have been convicted, not for "libel, summary" but for wilful disobedience of a formal court order; 18 U. S. C. 401 (3), like its predecessors,

includes within the definition of contempt of court "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." Since this language is clear on its face, there is little occasion to resort to the section's legislative history for additional light as to its meaning. *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), certiorari denied, 345 U. S. 925; see *Kaiser* v. *Irving Trust Co.*, 299 U. S. 115; *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85. The case at bar is thus completely distinguishable from *Nye* v. *United States*, 313 U. S. 33, which involved the interpretation of an ill-defined and inherently ambiguous clause of the statute, [illegible] "Misbehavior of any person in its [illegible] or so near thereto as to obstruct the administration of justice." In *Nye*, the Court relied upon previous construction of that clause, adopted in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402. Holding that the word "near" connoted actual geographic proximity, not proximate causation, the Court overruled its *Toledo Newspaper* decision to the extent that the latter had construed the term differently. In so doing it relied on the clause's legislative history. But here, as we have said, there is no ambiguity in the pertinent clause.

But even if the term "order" were sufficiently ambiguous to call for consideration of the legislative history of the clause in question, there is nothing in that history which supports petitioners' argument. The Act of March 2, 1831 (4 Stat. 487), from which 18 U. S. C. 401 is derived (*Nye* v. *United States*, *supra*, 313 U. S. at 45), itself states that it is "declara-

[illegible] the Act of 1831 was put as declaratory [illegible] because to Buchanan and the proponents of the measure that Act was merely an affirmation of existing law.

[illegible] Congress intended thereby to limit the power which had been claimed by certain federal courts to punish for contempt. The event which immediately necessitated it was the unsuccessful attempt to impeach Judge James H. Peck for imprisoning and disbarring one Lawless for publishing an allegedly libelous criticism of one of his opinions while an appeal therefrom was pending. See Frankfurter and Landis, *op. cit. supra*, 37 Harv. L. Rev. at 1024-37. It was in the light of this history that this Court, in *Nye*, stated that (313 U. S. at 45):

> "... the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789.

But, in the light of this history, what *Anderson* referred to was a "drastic delimitation" of the "undefined power" of the federal courts over acts of alleged contempt which did not constitute direct disobedience of a court order and were not committed in the presence of the court. While this Court has continued in subsequent cases to construe narrowly the 1831 Act and its present day successor, 18 U. S. C. 401 (in deciding, for example, that perjury in and of itself does not constitute contempt (*In the Matter of Michael*, 326 U. S. 224, 227), and that a lawyer is not an "officer of the court" within the meaning of the second clause of 18 U. S. C. 401 (*see supra*, p. 32) (*Gompers v. United States*, 350 U. S. 399); the Court has never narrowly construed the clause referring to "disobedience of writs, processes, orders, rules, decrees or commands of the courts, or given that clause any meaning other than that which its plain terms compel.

There is no indication either in the language of the 1831 Act, or in its legislative history that it was intended to restrict the ancient and settled power of the courts to punish as for contempt the direct disobedience of their orders. On the contrary, the managers of the impeachment of Judge Peck indicated that they accepted the power of the courts to punish the contemptuous refusal to obey their own orders. George McDuffie, in discussing the criterion for measuring the power of the courts to punish contempts summarily, argued (Stansbury, *Report of the Trial of James H. Peck*, p. 87) that punishment for contempt was within the power of the court only in

> . . . a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstructed. It will not do to rely upon a mere constructive interference, impeding the course of justice, by some far fetched implication.

Another manager, Henry R. Storrs, explicitly agreed with Blackstone that disobedience of orders of the court justified punishment for contempt. *Id.*, p. 396. Storrs went on to quote an eighteenth century letter written by Lord Erskine which stated (*id.*, p. 398):

> Every court must have power to enforce its own process and to vindicate contempts of its *authority*; otherwise the *laws would be despised*, and *this* obvious *necessity* at once produces and limits the *process* of attachment. [Emphasis in original.]
>
> Whenever any act is done by a court, which the subject is bound to obey, obedience may be enforced and disobedience punished by that summary proceeding.

And James Buchanan, in summing up for the managers, conceded that (*id.*, p. 436):

> . . . by its very organization, every court of justice is clothed with the power of imposing silence, r[es]pect and decorum in its presence, and enforcing obedience to all its lawful commands.

There can be no question of the historical basis of the views expressed by Buchanan and the other architects of the 1831 Act. "From the earliest times a refusal to obey an order of the king or of his officer, formally and expressly directed to a subject, has been

regarded as a contempt.'" Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 164. As Fox points out, the invocation of the contempt power to punish "disobedience to the commands of the King and his courts as well as other acts which tend to obstruct the course of justice" had become established by the fourteenth century. Fox, *The Nature of Contempt of Court*, 37 Law Q. Rev. 191, 201 (1921).

B. Petitioners, however, would carve an exception from the word "order" for cases involving disobedience of orders to surrender to judicial custody. Their argument (Br. 21 *et seq.*) is that there is no history to show that this particular type of disobedience had been punished as a contempt. As was pointed out by Judge Biggs, concurring in part and dissenting in

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'The passage in Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 164, to which the Court refers, follows:

> This, doubtless, was deemed a breach of allegiance. "*Contemptus breciatio*" was declared by the laws of Henry I to be an offense subjecting a person guilty of it to amercement. In the time of Henry II it was laid down that if a tenant duly summoned in the court was absent, the king or his justices might at their pleasure punish him for his contempt of court. So again, if the demandant in certain cases failed to produce his lord in court, "the body of the demandant himself should be attached on account of his contempt of court, and thus he shall be destrained to appear in court." This was equally true in the inferior courts. Thus it was a contempt of the lord of a manorial court for a person owing allegiance to the court to depart from it without answering a complaint. And similarly a burgess was guilty of contempt in failing to appear at the proper time before the borough court. Among the acts of contempt of the Vice's court was contempt "*in non parendo mandatis*." And further, as we have seen, it was contempt of the admiral's court to refuse to sue a matter that came in that court. [Citations omitted.]

part in *United States* v. *Hall*, *supra*, 198 F. 2d at 734, that case was probably the first of its exact kind decided by the courts. *Hall* and the subsequent case of *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841, both of which involved the same legal questions here in issue, are the only decisions precisely in point.[5] In cases involving violations of the conditions of bail, however, it has certainly been suggested that disobedience of a specific court order to appear would be an act of contempt. Thus, in *In re Dill*, 32 Kan. 668, 689–690, 5 Pac. 39, 47–48, the Kansas Supreme Court stated:

> To constitute a direct contempt of court there must be some disobedience to its order, judgment, or process. * * *.
>
> * * * * *
>
> The petitioner violated no order, direction, or judgment of the court, nor was he at large by direction or order of the court. He had entered into a recognizance, as the statute permitted him to do, by which he bound himself to the state to appear in court at the time and term of the court stated in the recognizance, and submit to a trial of the criminal charges therein pending against him. * * * The extent of his offending was in not appearing in court and submitting to the trial as he had bound himself to do by the recognizance, and absenting himself from the county where the court was held.

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[5] In *In re Kessler*, 32 Kan. 693, 5 Pac. 30, and *State* v. *Jordy*, 161 La. 104, 108 So. 229, the courts similarly refused to punish for contempt in situations in which the recognizance or bond was not accompanied by a specific order to appear. See, also, *United States* v. *Hall*, *supra*, 198 F. 2d at 729.

Even if the contumacious conduct here involved were novel or unusual, it would still be covered by the plain terms of the pertinent clause of the contempt statute, 18 U. S. C. 401 (3). But the conduct, we submit, is hardly so novel that it can be said that the applicability of the statute presents a new question. An order to surrender is but one variety of mesne process, acts of disobedience of which have always been punished through contempt proceedings. *E. g.*, *In re Rice*, 181 Fed. 217, 221 (C. C., M. D. Ala.) (evasion of service); *The P. I. Nevius*, 48 Fed. 927 (S. D. N. Y.) (resistance to and evasion of process of attachment); *Shotkin* v. *Atchison, T. & S. F. R. Co.*, 124 Colo. 141, 235 P. 2d 990, certiorari denied, 343 U. S. 906 (failure to appear in court in disobedience of summons); *Conneral* v. *City of Atlanta*, 7 Ga. App. 589, 67 S. E. 691 (same); *Aarons* v. *State*, 105 Miss. 402, 62 So. 419 (absconding despite knowledge of subpoena to appear as witness in criminal proceeding). And see the excerpt from Beale, *op. cit.*, note 4, *supra*, p. 33. All such cases involve acts of disobedience of various court orders to appear—orders which are not significantly different from an order to surrender. There is no valid reason why orders requiring defendants free on bail to surrender for commitment should be distinguished from the many other similar kinds of court orders (see the cases cited *supra*) enforcible through contempt proceedings. See, also, *infra*, pp. 70–76.

The purpose of punishing disobedience of court orders by contempt proceedings is to prevent obstruction of judicial processes. Such obstruction results

from disobedience of an order to surrender no less than from disobedience of any other kind of order, *e. g.*, disobedience of a subpoena. The District Court in the *Hall* case, in holding that the power of a court to punish disobedience of an order to surrender is essential to protect judicial processes, made these cogent observations (*United States* v. *Hall*, 101 F. Supp. 666, 672 (S. D. N. Y.), affirmed, 198 F. 2d 726, certiorari denied, 345 U. S. 905):

> That forfeiture of the bond does not always accomplish obedience to these orders is established by the facts now before us. Without power in the court to punish for wilful disobedience of these orders the only means remaining for securing fulfilment of the obligation to observe the terms of the bail would be rendered ineffectual. The judicial process must have inherent within it the power to punish wilful disobedience of orders directed to a defendant who has been released on bail. Any other rule would permit a defendant to avoid standing trial or submitting to sentence imposed following conviction, with the knowledge that the sole penalty would be forfeiture of bail—a matter of convenience to a person of means and a matter of indifference when bail has been posted by others.

The dearth of reported cases of the particular type here involved has a ready explanation. The ordinary bail bond or recognizance does no more than establish the conditions upon which bail shall become forfeit; it is akin to a pledge or contract of surety.[*] 6 Am.

[*] Historically, it was conceived that a person was in the custody of his bail, rather than of the sheriff. 4 Holdsworth, *History of English Law*, pp. 525–526.

Jur., *Bail and Recognizance*, §§ 2, 3, 6, 118, 135. A violation of the conditions establishes basis for forfeiture of the security but will not normally provide a foundation for charging willful disobedience of a specific order. And it is obvious that in most instances of flight the act of absconding will have taken place before the court has had any occasion to fix a specific time and place for appearance. The circumstance that violation of a specific order can be laid at the door of these petitioners may make this case unusual on its facts; it scarcely makes it unusual in principle, for the principle is one common to all cases of willful disobedience of court orders.[7]

It may also be observed that when flight takes place before trial,[8] the court, as a practical matter, will ordinarily be in a position to impose a sanction (other than forfeiture of bail) upon the apprehended fugitive. For, if he is convicted, the court will be entitled

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[7] The uncommonness of contempt cases involving bail jumpers does not, of course, suggest that absconding was lightly regarded at common law. A person under indictment who took flight was subject to the baneful sanctions of outlawry, described by Pollock and Maitland (*History of English Law* (1895), v. II, p. 447) as "an engine for compelling the contumacious to abide the judgment of the courts." And see *id.*, v. II, pp. 578–579; v. I, pp. 160–161. The process of outlawry as a method of dealing with the absconder from justice was imported into this country (*Respublica* v. *Doan*, 1 Dall. 86 (Pa. Sup. Ct., 1784); *Dale County* v. *Gunter*, 46 Ala. 118), although it fell into disuse (as it did also in England) in the nineteenth century. As late as 1860, the State of Pennsylvania adopted an outlawry statute. 19 Purdon's Penna. Stats. Ann., Sec. 1221.

[8] Bail after conviction became known only in relatively recent times. See *Rex* v. *Wilkes*, 4 Burr. 2527, 2542, 98 Eng. Reprint 327 (K. B., 1770); *Rex* v. *Brooke*, 2 Term Rep. 190, 194, 100 Eng. Reprint 103, 105 (K. B., 1788).

to take his past conduct into account in exercising its discretionary sentencing powers. Certainly, we see no valid reason why flight from a court's authority (whether pre-conviction or post-conviction flight) may not be punished as a contempt in any case in which the exact terms of the contempt statute are met, *i. e.*, when it appears that the flight constituted a knowing violation of a specific order of the court. Considering the instant case, can it be said that petitioners—persons who had been duly convicted of crime, had had their sentences affirmed by the highest court of the land, and had been directed to surrender for commitment—are to be deemed less contumacious, albeit they continued to flout the court's order for more than four years, than, let us say, a witness who fails to answer a subpoena or a party who fails to comply with an order to produce a document? The suggestion makes neither good sense nor good history.

The enactment of the so-called bail-jumping statute (18 U. S. C. 3146; *see infra*, pp. 83–84) provides the courts with additional means to vindicate their authority. But at the time of the contumacious action here in question, punishment for contempt was the sole means by which the District Court could do so. Moreover, Congress, in providing the new remedy, implicitly recognized the power of the courts to punish the act of absconding as an act of contempt where the refusal of the defendant to surrender involves also the disobedience of a specific order. For the statute expressly provides that "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its powers to punish for contempt."

III

THE DISTRICT COURT HAD THE POWER TO SENTENCE PETITIONERS TO TERMS IN EXCESS OF ONE YEAR

Petitioners contend (Pet. 5–16; Br. 26–40) that "[t]he trial court was without power to sentence petitioners to terms in excess of one year" (Pet. 5; Br. 26). They base this on (a) an alleged ambiguity in the punishment provision of 18 U. S. C. 401 (Pet. 12; Br. 28–29); (b) Section 24 of the Clayton Act (Pet. 6–14; Br. 30–37); (c) Rule 7 (a) of the Federal Rules of Criminal Procedure (Pet. 9–10; Br. 33); and (d) the Fifth Amendment's prohibition against holding any person to answer for a capital or otherwise infamous crime other than by indictment by a grand jury (Pet. 14–16; Br. 37–39). We consider these contentions in sequence.

A. THE PUNISHMENT PROVISION OF 18 U. S. C. 401 IS NOT AMBIGUOUS; IT CONFERS ON ALL FEDERAL COURTS AN UNLIMITED POWER TO PUNISH CONTEMPTUOUS CONDUCT BY FINE OR IMPRISONMENT. THE ONLY QUALIFICATION IS THAT THE POWER MUST BE EXERCISED REASONABLY AND NOT ARBITRARILY

Petitioners contend (Br. 28–29) that the punishment provision of 18 U. S. C. 401 is ambiguous, and then proceed to argue from this premise that the District Court's power to sentence them to imprisonment was limited to the imposition of a maximum term of one year. The argument runs as follows: The words "shall have power to punish by fine or imprisonment, at its discretion" could mean either (1) that the court has discretion to impose either the one or the other form of punishment (but not unlimited

discretion as to the *quantum* of the punishment), or (2) that the *amount* of punishment (in whichever form imposed) is in the discretion of the court; the former of those two meanings is more favorable to accused persons; therefore, under the principle requiring strict construction of penal statutes, the former meaning is to be adopted. The consequence of this would be, they argue, that the District Court in this case did not have unlimited discretion with respect to the duration of the prison term which it imposed (as the Government contends, subject, always, of course, to the rule of reason, *i. e.*, that the discretion be exercised in a non-arbitrary manner), but a limited discretion with regard to such duration (not more than one year, as they elsewhere argue).

We submit that this argument is without substance because the punishment provision of 18 U. S. C. 401 is unambiguous[10] and fully supports the Government's contention as to its meaning. The words "shall have power to punish by fine or imprisonment, at its discretion" have been a part of the statute providing for the punishment of contempt of court since the first congressional enactment providing for the establishment of the federal judiciary. Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, provided, in language substantially identical with the foregoing language, that

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[9] Elsewhere petitioners argue that, *if* the court selects imprisonment as the punishment to be imposed, the maximum term imposable is one year. See *infra*, pp. 44–76.

[10] The rule of strict construction has, of course, no applicability where the words are unambiguous. "Where there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96.

the courts of the United States "shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *." This provision was merely the expression by Congress of the accepted common law view as to the power of a court to punish contempt. "In the case of almost every other offence punishable by fine or imprisonment, a limit to the punishment is fixed by Act of Parliament; in all cases of contempt, on the other hand, there is considered to be an unlimited power in the court to inflict imprisonment and, in the case of contempt of a criminal nature, to impose a fine as well, and that also without limit." Fox, *Eccentricities of the Law of Contempt of Court*, 36 Law Q. Rev. 394, 398. Thus, when the words "at its discretion" are given their normal meaning, and particularly when they are read in the light of the common law, it is clear that what is meant is that the court has the power to impose a fine or a prison term which, in the opinion of the court, will be commensurate with the gravity of the act of disobedience or other contempt involved.[11]

[11] It is true, as petitioners suggest (Br. 27), that in England contempts are punishable as are common law misdemeanors. But that does not advance their argument. "[F]or common law misdemeanours, that is to say, any offences for which a statute has not prescribed any particular period of imprisonment, the law is, and always has been, that the court can pass a sentence of imprisonment and impose a fine at its discretion, provided that it does not impose an inordinate sentence." *Rex* v. *Marcus*, 2 All E. R. 965, 967 (K. B., 1950), 115 J. P. 5 (sentence of four years imprisonment for the common law misdemeanor of conspiracy to evade customs duties).

The function of the term "at its discretion" in Section 401 is to tell the court what penalty can be imposed by it. When the words "fine" and "imprisonment" appear in the penal provision of a statute, the questions that automatically arise are: "How much fine"? and "How long a term of imprisonment"? These questions are usually answered by the inclusion in the statute of a maximum fine and a maximum number of months or years of imprisonment.[12] Section 401 is noteworthy for its very lack of maximum figures. The questions are answered by the words "at its discretion." The statute thus in no way limits the length of sentence or the amount of fine which may be imposed on a contemnor.

The above reading of the statute is buttressed by the case of *In re Bradley*, 318 U. S. 50, where it was held that a person convicted of contempt of court may be punished by a fine or imprisonment but not both. To give the statute a meaning other than that contended for here would make the phrase "at its discretion" completely superfluous, since the word "or" clearly requires that the punishment imposed be in the alternative. There is no reason to suppose that Con-

[12] There are numerous statutes which provide a maximum penalty for contempts arising under certain specific situations. A maximum fine of $1,000 and imprisonment for not more than one year may be imposed by a court where a party is in contempt of, or refuses to appear before, the Securities and Exchange Commission. 15 U. S. C. 78u, 48 Stat. 900. A party in contempt of the Federal Communications Commission is subject to a fine ranging from $100 to $5,000 and imprisonment for not more than one year. 47 U. S. C. 409m, 48 Stat. 1097-1098. Cf. 2 U. S. C. 192, the so-called "contempt of Congress" statute ("a fine of not more than $1,000 nor less than $100 and imprisonment * * * for not less than one month nor more than twelve months").

press intended the phrase to be a mere redundancy, particularly in view of the fact that the statute names no maximum figures. The phrase, as Judge Hand pointed out in the opinion below, means that the "term of imprisonment is to be as much in the court's discretion as the fine" (R. 78).* Very heavy fines have been levied to punish a party who has refused to obey an order of the court. This Court enforced a fine of $700,000 in *United States* v. *United Mine Workers*, 330 U. S. 258. A fine of $1,400,000 against a union and a fine of $20,000 against an individual defendant were deemed to be within the proper discretion of a trial court in *International Union, United Mine Workers of America* v. *United States*, 177 F. 2d 29 (C. A. D. C.), certiorari denied, 338 U. S. 871. It would obviously give the statute a strained meaning to hold that there is this tremendous latitude given the court when it sees fit to impose a fine but that one year is the maximum term of imprisonment. Such a construction should be rejected as not within the language or intent of Congress. The purpose of the contempt power is to maintain and vindicate the authority of the federal courts. The court should consequently be permitted to protect itself and its functions to the degree required by the seriousness of the contempt committed (*Ex parte Grossman*, 267 U. S. 87, 117), subject, of course, to the qualification that the power must not be exercised arbitrarily, *United States* v. *United Mine Workers*, *supra*, 330 U. S. at 304–305.

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* To the same effect see Note, *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L. J. 83, 99; Thomas, *Problems of Contempt of Court* (1934), p. 10.

A long line of federal decisions has recognized that, under Section 401 and its predecessors, a court has just such unlimited power to sentence for contempt. For example, in *Warring* v. *Huff*, 122 F. 2d 641, 642 (C. A. D. C.), the court, speaking through Circuit Judge (later Chief Justice) Vinson, observed that "the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge." Again, in *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136, 139 (C. A. 7), certiorari denied, 322 U. S. 734, the court ruled that punishment in a contempt proceeding "rests solely in the sound discretion of the court, subject only to the Constitutional privilege against cruel and unusual punishment." In both the *Warring* and *Lederer* cases, the sentence imposed exceeded one year.

B. NOTHING IN THE "PREVAILING USAGE" CLAUSE OF SECTION 24 OF THE CLAYTON ACT JUSTIFIES PLACING A ONE-YEAR MAXIMUM ON PRISON SENTENCES FOR CRIMINAL CONTEMPTS OF COURT

Petitioners' argument, insofar as it rests on the "prevailing usage" clause of Section 24 of the Clayton Act of 1914 (see *infra*, p. 86), runs as follows (Br. 30):

"Sections 21 and 22 of the Clayton Act relate to contempts for disobedience of court orders where the contemptuous conduct is a criminal offense under federal or state law. Section 22 requires contempts of this character to be tried by a jury and fixes the maximum punishment at imprisonment for six months and

a fine (payable to the United States) of $1,000. Section 24 of the same Act provides that

> * * * nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, *but the same, and all other cases of contempt not specifically embraced within section twenty one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.* [Italics added.][1]

"Section 24," petitioners' argument continues (Br. 30), "accomplishes two purposes. By its first clause, it excludes certain kinds of contempt (including the kind involved here) from the jury trial requirement and limitation on punishment contained in Section 22. By its second clause (italicized above), it limits the punishment for contempts of the excluded categories to that which prevailed on October 15, 1914, the date of enactment of the Act." In other words (petitioners argue), "the punishment for contempts of the classes described in Section 24 must be determined by reference to the usage which prevailed in 1914" (Br. 31). But, say petitioners, there is "no reported case, federal or state," prior to 1914, "of a sentence in excess of one year * * * for contempt" (Br. 29).[2] Hence,

[1] The substance of Sections 21, 22 and 24 of the Clayton Act is now contained in 18 U. S. C. 402 and 3691. See *infra*, pp. 82-83.

[2] While this statement is not strictly accurate (see *infra*, p. 54), it may be accepted as true for present purposes.

they conclude, it was the intent of Congress, by the "prevailing usage" clause of section 24 of the Clayton Act," to "codify this century and a quarter of undeviating American practice and make it applicable to the classes of contempts to which the maximum sentence of six months provided by section 22 does not apply" (Pet. 8; Br. 30). In other words, it is said, it was the intent of Congress to "[freeze] into statutory law by Section 24 of the Clayton Act" (Br. 30) a one-year maximum prison sentence for all contempts other than the particular kind of contempt which Section 21 of the Clayton Act defined (with respect to which Section 22 of the Act imposed a maximum sentence of six months' imprisonment and a $1,000 fine).

Petitioners must surely agree that this was a singularly vague and circuitous way for Congress to fix a statutory maximum on prison sentences which might generally be imposed for criminal contempt. Congress knows how to establish maximum penalties for criminal offenses, as a glance at the Criminal Code will show. Indeed, in Section 22 of this very Clayton Act (see *supra*, pp. 44-45), Congress had just fixed such a statutory maximum—a fine of $1,000, or six months' imprisonment, or both—for the special type of contempt defined by Section 21, *viz.*, disobedience of a federal court order where the contemptuous conduct is also a criminal offense under state or federal law. It strains too far to suppose that Congress, in Section 24, was attempting to set a statutory maximum for all other types of contempt in such strangely circumlocutionary language as petitioners' argument would

require us to believe. Moreover, there is not a syllable of legislative history to support that argument. On the contrary, as we shall show, both the context and the legislative history of Section 24 demonstrate that Congress never entertained the notion that the "prevailing usage" clause of Section 24 (now contained in the 3d paragraph of 18 U. S. C. 402) had any bearing on the penalties for contempt. As we shall also point out, there are still other objections to petitioners' theory.

I. The statutory context, as well as the legislative history, of the "prevailing usage" clause of Section 24 of the Clayton Act shows that its purpose was merely to make it so that the procedure for punishing contempts of types other than that defined by Section 21 was to continue as in the past.

(a) *Context.*—Sections 21-25 of the Clayton Act (38 Stat. 738-740) formed an integral unit having no particular connection with the rest of the Act.

Section 21 provided that any person who should willfully disobey "any lawful writ, process, order, rule, decree, or command" of any federal district court "by doing any act * * * thereby forbidden to be done by him," if the act were "of such character

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[1] These sections originally constituted the so-called "Clayton * * * contempt [bill]." That bill, together with another bill, known as the "Clayton injunction * * * [bill]," had passed the House in the preceding (62d) Congress, but had failed of passage in the Senate. The substance of both these bills was, in the 63d Congress, added to the Clayton Anti-Trust bill, and the resulting measure was enacted as the Clayton Act. See H. Rept. No. 627, 63d Cong., 2d sess., pp. 21, 41-46; cf. Reyser's Note, last paragraph, to 18 U. S. C. 402. See also *infra*, pp. 30-35.

"as to constitute also a criminal offense" under any federal statute or any law of the state in which the act was committed, should "be proceeded against for his said contempt as hereinafter provided."

Section 22 prescribed (1) the procedure whereby such contempts were to be proceeded against and (2) the punishment therefor. The procedure consisted of issuance of a show cause order on affidavit or information, service thereof on the alleged contemnor, issuance of an attachment against the person of the accused in the event of his failure or refusal to make return to the rule to show cause, opportunity to the accused to purge himself before trial, and, most important of all (See *infra*, pp. 50-53), trial by jury if the accused should demand it (such trial to conform as nearly as possible to the usual practice in ordinary criminal cases). The punishment prescribed was "fine or imprisonment, or both, in the discretion of the court," with the *proviso*, among others, that "in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months."[1]

Section 23 contained further procedural provisions applicable to proceedings against persons accused of contempts of the type defined by Section 21, such as preservation of bills of exceptions, appeal, bail, etc.

Section 24, the section on which petitioners rely — provided that "nothing herein contained shall be con-

[1] Sections 21 and 22 are now, in substance, consolidated and codified as 18 U. S. C. 402, pars. 1 and 2, and 18 U. S. C. 3691, par. 1.

strued to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing."[18]

Section 25 provided a special one-year statute of limitations for contempts, and has no present relevance.

We submit that, viewed in the context in which it was enacted, Section 24 gives no support to, but on the contrary refutes, petitioners' argument. The natural meaning to be gathered from the section is that Congress intended to make it clear that the *procedural provisions set forth in Section 22*, and in particular the newly-guaranteed right to a jury trial, were to be limited to the special type of contempt defined in Section 21; that those provisions were not to be construed to relate to any of the types of contempt specifically described in Section 24; but that, on the contrary, these latter "and all other cases of contempt not specifically embraced within" Section 21 were to continue as in the past to "be punished" (*i. e.*, prosecuted or proceeded against) "in conformity to the usages at law and in equity now prevailing."

[18] Section 24 is now, in substance, codified as 18 U. S. C. 402, par. 3.

There is not the slightest suggestion in the language or context of Section 24 that Congress intended, in addition to preserving traditional procedures for punishing non-Section 21 contempts, to impose a maximum penalty for such contempts. This is particularly evident in light of the fact that Congress, virtually in the same breath, imposed just such a maximum for the particular type of contempt defined in Section 21.

(*b*) *Legislative history.*—As reported out of committee in the House, Sections 21-25 of the Clayton Act (as finally enacted) were numbered Sections 19-23, Section 24 of the Act being Section 22 of the bill (H. Rept. No. 627 to accompany H. R. 15657, 63d Cong., 2d sess., pp. 6-71. The committee report, after analyzing and explaining the first 14 sections of the bill (*id.*, pp. 7-21), which dealt with antitrust matters, stated (*id.*, p. 21; see also S. Rept. No. 698, 63d Cong., 2d sess., p. 18):

> The remaining sections of the bill, 15 to 23, inclusive, are substantially the same as the provisions of the two separate bills (H. R. 23635 and H. R. 22591, 62d Cong.), known as the Clayton injunction and contempt bills, which were considered and passed by the House of Representatives at the last Congress, but failed of passage in the Senate. *They deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the court.* The reports upon these bills made to the House in the last Congress are comprehensive and explain in detail their purpose, and for convenience are adopted as a part of this report * * *. [Emphasis added.]

The italicized language corroborates the view that the "prevailing usage" clause of Section 24 of the Act (Section 22 of the bill as reported out) was designed merely to preserve the previously existing *procedure* for punishing contempts of types other than that defined by Section 21 of the Act (Section 19 of the bill), and not, as petitioners argue, to freeze into law a "usage" as to punishment.

This conclusion is further corroborated by the House committee report which reported out the original bill containing the pertinent provisions (Sections 21-25) of the Clayton Act as finally enacted—that is to say, the "Clayton * * * contempt [bill]" (H. R. 22591, 62d Cong.). This bill proposed to amend the former Judicial Code (of 1911) by adding, immediately following Section 268 (now, in substance, 18 U. S. C. 401), five new sections, Sections 268a, 268b, 268c, 268d, and 268e. These proposed new sections were substantially identical with Sections 21-25 of the Clayton Act as finally enacted, Section 268d being the section corresponding to the Clayton Act's Section 24. The pertinent report (H. Rept. No. 613, 62d Cong., 2d sess.[*]) explained that "the most important provisions of the bill are contained in section 268b" (*id.*, p. 1), this being the section corresponding to Section 22 of the Clayton Act which proposed to guarantee a jury trial to the accused, at the latter's option, in "such cases of contempt

[*] This report (see *supra*, p. 30) is one of the two reports which, in the next Congress, were appended to H. Rept. No. 627, 63d Cong., 2d sess., accompanying the bill (H. R. 15657) which became the Clayton Act. It appears at pp. 11-51 of H. Rept. No. 627.

specified in section 268 as constitute a criminal offense under any statute of the United States or at common law." (*ibid.*). "Section 268d," the report further explains (*id.*, p. 2)—

> * * * excepts from the operation of the act contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.

"Thus it is seen," states the report (*ibid.*)—

> * * * that the bill applies and gives a jury trial, with the exception noted, in all proceedings for contempt wherein the acts alleged to have been committed constitute a criminal offense, either under any Federal statute or at common law. * * *

It clearly appears from these excerpts that the whole point and purport of the "prevailing usage" clause was to preserve, for all but the particular class of contempts defined by Section 268a (Section 21 of the Clayton Act), the previously existing *procedure* for punishing contempts (in particular, trial to the court without a jury)—and not, as petitioners claim, to fix a maximum penalty for such contempts.

Subsequent passages of the report further reinforce this conclusion. Replying to critics of the bill who claimed that it involved an unconstitutional "curtail[ment of] the power of the courts in the trial of contempts" (*id.*, p. 2), the report pointed out that it was in fact a far milder measure than the Act of March 2, 1831, c. 99, Section 1, 4 Stat. 487, which had substantively limited the contempt powers of the federal courts by "lopp[ing] off" some of the jurisdiction which at least one such court "had assumed and exercised" (*ibid.*). The bill under consideration, the report stated, "*only changes the procedure in contempt cases*" (*id.*, p. 4; emphasis added).

And, finally, summing up the effect of the proposed legislation on existing law, the report stated (*id.*, p. 6):

> The feature of the bill against which the most strenuous argument has been directed is that providing for jury trials. But no one has shown that such provision amounts to anything more than a change of procedure. So that *the question comes down to this, Has Congress or not the power to prescribe procedure?* * * *
> [Emphasis added.]

In accordance with the evidence that was available to the United States Congress concerning contempt in criminal contempt cases prior to the enactment of the Clayton Act

Basic to petitioners' "prevailing usage" argument is their assumption that, prior to the passage of the Clayton Act in 1914, "there was no reported case, federal or state, of a sentence in excess of one year * * * for contempt" (Br. 29). We have shown above

(pp. 44-53) that, even if this were so, it would be irrelevant, since Congress lent no purpose to refer[illegible] to "the usages at law and in equity [not] prevailing," to "freeze" a statutory maximum penalty into the federal law of contempt. The argument has other defects.

To begin with, there are at least two reported American cases, antedating the Clayton Act, in which a sentence in excess of one year was imposed for criminal contempt. *Hurley v. Commonwealth*, 188 Mass. 443, 74 N. E. 677 (1905) (18 months at hard labor);[1] *Pollard v. Commonwealth*, 30 Ky. L. Rep. 107, 97 S. W. 433 (1906) (two years' imprisonment).[2] Moreover, it is indisputable that there has never been a limitation on sentences for criminal contempt at common law. See quotation from Fox, *supra*, p. 41; Oswald, *Contempt of Court* (3d ed., 1911), chapter III.[3]

[1] While the court changed the trial court's designation of the place of confinement from the "house of correction" to a "jail," it did not otherwise alter the sentence imposed.

[2] It is true that this case (pursuant to Kentucky's statutory procedures) was tried to a jury. It is nonetheless opposed to petitioners' thesis that there was a settled and unvarying usage whereby the sanction for contempt was limited to one year's imprisonment.

[3] It is certain that in colonial America infamous punishments were imposed for contempt of court. See Hickley, *Legal Developments in Colonial Massachusetts, 1630-1686*, 37 Columbia Univ. Studies, No. 2, p. 110 ("requiring the culprit to stand an hour with one ear nailed to the pillory and then to be released by having it cut off"); Scott, *Criminal Law in Colonial Virginia* (1930), p. 173, n. (stocks); Chitwood, *Justice in Colonial Virginia* (1905), pp. 89-90 (lashes). As to the summary character of contempt proceedings in early America, see Goebel & Naughton, *Law Enforcement in Colonial New York* (1944), p. 605; *Case of Hummel and Bishoff*, 9 Watts 416, 421 (Pa., 1840); Quincy, Mass. Reports, 1761-1772, p. 245.

It is also significant that there is no evidence that the courts ever assumed that they were subject to any such limitation as petitioners would read into the past. Judge Hand observed below (R. 77): "There is no reason to suppose, because courts had not up to 1914 imposed imprisonment for more than a year, that they thought they had not the power to do so." The decisions, in fact, show that they thought the contrary—as one would, indeed, expect in light of the common law and in view of the fact that Congress, since the first Judiciary Act (1789), has used the term "discretion". For example, in *In re Henry*, 205 Fed. 626 (C. A. 9), decided the year before the adoption of the Clayton Act, the court observed (at 632):

> In the absence of a statute limiting the amount of a fine or the duration of imprisonment, the punishment is within the sound discretion of the court, having in view the ability of the offender to comply with the judgment of the court as to the amount of the fine.

Similarly, in *Carter* v. *Commonwealth*, 96 Va. 791, 811 (1899), the court, in discussing the power of courts of the United States to punish for contempt, noted that "* * * their discretion is without limit as to the amount of the fine or the duration of the imprisonment."

In *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646, decided within two years after the passage of the Clayton Act, a sentence to a year and a day for contempt was involved. State cases, including *Flannagan* v. *Jepson*,

177 Ia. 393, 158 N. W. 641,[2] upon which petitioners primarily rely (Br. 29), were urged on the court for the proposition that the sentence in question was beyond the power of the trial court. The Eighth Circuit, in rejecting this claimed limitation, stated (at 754-755):

> While we could, if we saw fit, point out many reasons why these cases are either unsound or inapplicable, suffice it to say that they do not attempt to pass upon the question of the power of a federal court to sentence to the penitentiary for contempt.

Certainly, this decision, following close upon the adoption of the Clayton Act, is persuasive evidence that the federal courts, like the English courts, have operated on the assumption that the only limitation is that imposed by sound discretion.

3. Furthermore, the "prevailing usage" clause was enacted into positive law in 1948; by that date, there had been numerous instances of federal contempt sentences exceeding one year.

Finally, even if the "prevailing usage" clause were pertinent to the issue of the power of a court to sentence for contempt to a term longer than a year (which we dispute), the *relevant* "prevailing usage" clause would not be that of the Clayton Act's Section 24 (which was repealed when the 1948 Criminal Code was enacted into positive law, see Act of June 25, 1948, c. 645, Section 21, 62 Stat. 683, 862, 864), but the comparable clause of 18 U. S. C. 402, par. 3 (see *infra*,

[2] The *Flannagan* case decided in 1916, held that no sentence in fact false (the actual sentence was one which could be imposed for contempt without violating the Sixth Amendment).

p. 83), which took effect in 1948. As of 1948, sentences in excess of one year had been imposed in numerous federal cases.[24] *E. g., Hill* v. *United States ex rel. Weiner*, 300 U. S. 105 (1937) (sentence of two years); *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646 (1916) (one year and a day); *Conley* v. *United States*, 59 F. 2d 929 (C. A. 8) (1932) (two years); *Warring* v. *Huff*, 122 F. 2d 641 (C. A. D. C.), certiorari denied, 314 U. S. 678 (1941) (one year and one month); *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136 (C. A. 7), certiorari denied, 322 U. S. 734 (1944) (one year and a day). And see *Dolan* v. *Commonwealth*, 304 Mass. 325, 23 N. E. 2d 904 (1939) (two and one-half years); *People ex rel. Rusch* v. *Montesano*, 293 Ill. App. 630, 12 N. E. 2d 915 (1938) (two years).

In the *Creekmore* case, *supra*, the court rejected, as follows, the contention that a sentence to a term of a year and a day in a federal penitentiary for criminal contempt was beyond the power of a court to impose:

> It is insisted that the court exceeded its power in sentencing the defendant to imprisonment in the penitentiary for the term of a year and a day. We have seen that the Judicial Code authorized the federal courts to punish by fine or imprisonment, at the discretion of the court, for contempt of their authority. There is nothing in the statute which limits

[24] As noted by Judge Hand in the opinion below (R. 77), all such sentences were, of course, invalid if petitioners' view as to the intended effect of the "prevailing usage" clause of the Clayton Act is correct.

where the imprisonment shall take place, except the discretion of the court. * * * It expressly declared that the length of imprisonment and its place should be in the discretion of the court. [237 Fed. at 752]

* * * * *

Assuming that criminal contempts are offenses in the meaning of this statute [former § 335 of the Criminal, now 18 U. S. C. 1, declaring offenses punishable by death or imprisonment for more than one year to be felonies], * * * we must either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the court in some mysterious way means that the discretion is limited to one year, without that thought being expressed. * * * We see no reason why, under Judicial Code, § 268 [now 18 U. S. C. 401], the court could not sentence a guilty party for a year and a day, and, if it had this power, then section 335 of the Criminal Code made it a felony. * * * [753–754]

* * * * *

* * * Is an order that a defendant in a criminal contempt case be imprisoned a year within the "discretion of the court" but a sentence for a year and a day beyond it? We have neither seen nor heard any argument which so convinces us * * *. [754] [25]

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[25] The same opinion also states (at 755):

The defendant has argued that, if a contempt be a felony and the defendant a convict, the provisions of the various amendments to the Constitution of the United States will protect him against a summary trial; but we have already

In the *Hall* case, *supra*, 300 U. S. 105, this Court unanimously sustained a two-year sentence imposed for contempt of an antitrust decree obtained by the United States. The validity of the sentence was challenged, although the ground was a claim of arbitrary discrimination (as between classes of contemnors) rather than an assertion that contempt sentences may never exceed a year.

Finally, since 1948, the courts have repeatedly sustained contempt sentences in excess of one year: *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), certiorari denied, 345 U. S. 905 (sentence of three years); *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841 (four years); *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916 (18 months); *Reich* v. *United States*, 239 F. 2d 134 (C. A. 1), certiorari denied, 352 U. S. 1004 (two years); *United States* v. *Brown*, not yet reported, C. A. 2, No. 24626, decided July 10, 1957, pending on petition for a writ of certiorari, No. 356, this Term (15 months); *United States* v. *Miranda*, not reported, S. D. N. Y., No. C 144-167 (three years); *United States* v. *Phillips*, not reported (W. D. Wash.), pend-

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pointed out in Merchants' Stock & Grain Co. v. Board of Trade of Chicago, supra, [201 Fed. 20] that this is not true. If there seems to be any conflict between declaring a criminal contempt a felony and then declaring that the defendant is not entitled to the protection of the amendments to the Constitution, the explanation is to be found in the announcement first made by Chief Justice Fuller in O'Neal v. United States, 190 U. S. 36, * * * and repeated in Bessette v. Conkey Co., 194 U. S. 324, * * * that "proceedings in contempt may be said to be sui generis."

ing on appeal to the Ninth Circuit, No. 14323 (three years).

In a number of other cases in which a sentence of more than one year was imposed, the cases were reversed on appeal. *Nilva* v. *United States*, 227 F. 2d 74 (C. A. 8), reversed, 352 U. S. 385 (sentence of a year and a day); *Pendergast* v. *United States*, 128 F. 2d 676 (C. A. 8), *reversed*, 317 U. S. 412 (two years); *Yates* v. *United States*, 107 F. Supp. 412 (S. D. Cal.), reversed, 227 F. 2d 848 (C. A. 9) (three years); *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1) (eighteen months); *Healey* v. *United States*, 186 F. 2d 164 (C. A. 9) (four contemnors who received sentences of a year or more.) In none of the cases, however, was reversal predicated on lack of authority in the sentencing court to impose a term of imprisonment of more than one year. In the *Nilva* case, *supra*, though the case was remanded by this Court for resentencing, the basis of remand was not lack of power to impose a sentence in excess of a year. Although the dissenting opinion in that case referred to numerous grounds which were thought sufficient to require setting aside of the conviction, there is no suggestion that the sentencing court exceeded its powers in imposing a sentence longer than a year.

C. RULE 7 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE HAS NO APPLICATION TO THE PRESENT CASE; THE PROCEDURE FOR CRIMINAL CONTEMPT IS GOVERNED BY RULE 42

Petitioners also contend (Pet. 9–10; Br. 33) that, since criminal contempt "is * * * an 'offense'" (Pet. 10), and since they were not prosecuted by indictment

(as required by Rule 7 (a) of the Federal Rules of Criminal Procedure in the case of all "offenses" punishable either by death or by imprisonment for a term exceeding one year or at hard labor (see *infra*, p. 87)), it follows that it was not permissible for the District Court to sentence them to imprisonment for more than one year. This is patently unsound.

Rule 7 (a) provides, so far as here pertinent, that "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment * * *. Any other offense may be prosecuted by indictment or by information." The Notes of the Advisory Committee on Rules explain that Rule 7 (a) "gives effect to" the Fifth Amendment's prohibition against holding any person to answer for a capital or otherwise infamous crime otherwise than by indictment by a grand jury. As we show, *infra*, pp. 63–76, however, criminal contempt is not and has never been considered within the purview of this provision of the Fifth Amendment. Therefore, Rule 7 (a), which "gives effect to" that provision, has no application to the procedures to be followed in the prosecution of criminal contempt.

Rule 42 (see *infra*, pp. 87–88), moreover, establishes the exclusive procedures to be followed in cases of criminal contempt. Rule 42 (a) authorizes "summary disposition" of the contempt where the contumacious act has been committed within the judge's sight or hearing and in his actual presence. Rule 42 (b), which, when enacted in 1948, substantially followed the provisions of existing law (see Note of the Ad-

visory Committee), provides for "Disposition Upon Notice and Hearing" in all other types of criminal contempt. Notice may be given orally in the presence of the defendant by the judge in open court, or by an order to show cause, or by an order of arrest. Rule 42 thus requires neither indictment nor information. When the Rule was adopted in 1948, there had been numerous federal cases of criminal contempt in which sentences of more than one year had been imposed.* *See supra*, p. 57. None of these cases had been prosecuted by indictment or information. If the draftsmen of Rule 42 had intended to make an exception to cover imprisonment-in-excess-of-one-year cases, they would hardly have remained silent. As it is, the Rule makes all criminal contempts punishable either by summary disposition or upon notice and hearing.

If petitioners' contention were carried to its logical conclusion, it is evident that Rule 42 would have no application to *any* case. Rule 7 (a) requires that those "offenses" which are not required to be prosecuted by indictment be prosecuted by information. If a criminal contempt is an "offense" within the purview of Rule 7 (a), but not one required to be prosecuted by indictment (because, as petitioners contend, the limit of punishment is one year), then it would follow that it would have to be prosecuted by information. In other words, if petitioners' basic premise be accepted, all criminal contempts would have to be prosecuted by indictment or information. But this would leave no room for Rule 42 or for the procedures expressly provided thereby. It is obvious,

therefore, that Rule 7 (a) has no application to criminal contempts and that Rule 42 means what it says.

D. THE POWER TO PUNISH CRIMINAL CONTEMPT BY A TERM OF IMPRISONMENT IN EXCESS OF ONE YEAR DOES NOT CONFLICT WITH THE REQUIREMENT OF THE FIFTH AMENDMENT THAT INFAMOUS CRIMES MUST BE PROSECUTED ONLY UPON INDICTMENT BY A GRAND JURY

Petitioners, finally, seek to support their construction of the "prevailing usage" clause of the Clayton Act (*supra*, pp. 44-60) and of Rule 7 (a) of the Federal Rules of Criminal Procedure (*supra*, pp. 60-63) on the ground that such construction would avoid adjudication of a constitutional question—namely, whether criminal contempt, if punishable by imprisonment for more than a year, is not an "infamous crime" within the meaning of the Fifth Amendment, and accordingly one which may be prosecuted only by indictment (Br. 37-40, 27; Pet. 14-16). The "Fifth Amendment" argument, spelled out, runs as follows:

An "infamous crime," within the meaning of the Fifth Amendment, is one punishable by imprisonment in a penitentiary, with or without hard labor. *Mackin* v. *United States*, 117 U. S. 348; *cf. Ex parte Wilson*, 114 U. S. 417. But, a crime, to be punishable by imprisonment in a penitentiary, must be one that is punishable by imprisonment for more than one year. 18 U. S. C. 4083.[*] Therefore, a crime that is punish-

[*] This statute requires not merely that an offense, to be punishable in a United States penitentiary, be punishable by imprisonment for more than a year but that the actual sentence imposed be for more than a year. Only with the consent of

able by imprisonment for more than a year is "infamous," and prosecution by indictment is constitutionally required.

The premise of the above argument is that contempt is a crime in the constitutional sense.[27] If that premise be sound (which we deny), the logic of petitioners' argument carries far indeed, for, in that event, the constitutional right of trial by jury applies equally. That right, conferred by Article III and by the Sixth Amendment, does not extend to felonies alone. Assuredly, it covers most misdemeanors, the only exceptions being those which come within the narrow category of "petty offenses".[28] *District of Columbia* v. *Clawans*, 300 U. S. 617, 623-630. This would mean, at a minimum, that the innumerable criminal contempt cases involving imposition of substantial fines (*e. g.*, *United States* v. *United Mine Workers*, 330 U. S. 258 ($700,000 upon the union; $10,000 upon defendant Lewis)) or imprisonment for

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the defendant, may a sentence for "an offense punishable by imprisonment for a year or less be served in a penitentiary."

[27] On the subject of contempts, the Constitution is silent. Moreover, so far as we have been able to ascertain, the subject was not raised at the Constitutional Convention, at the ratifying conventions of the states, or at the time of the adoption and ratification of the Bill of Rights.

[28] The test of "petty offense" suggested by the *Clawans* case is that the moral quality of the act must be relatively inoffensive and the maximum penalty relatively minor. 18 U. S. C. 1 (3) now defines as a petty offense "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." It has been held that, even though petty offenses may be tried without a jury, Congress must first specifically provide that there shall be no jury. *Smith* v. *United States*, 128 F. 2d 990 (C. A. 5).

more than six months (*e. g., Savin, Petitioner*, 131 U. S. 267 (one year)), were proceedings conducted in disregard of constitutional rights."

I. Petitioners' premise ignores the historically unique status of the offense of criminal contempt. Contempts have never been classed in this country, as in the case of other types of criminal offenses, as either "felonies" or "misdemeanors"; they have always been regarded as *sui generis*. *O'Neal* v. *United States*, 190 U. S. 36, 38; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326; *Myers* v. *United States*, 264 U. S. 95, 103; *Blackmer* v. *United States*, 284 U. S. 421, 440; *Cockmore* v. *United States*, 237 Fed. 743, 755 (C. A. 8), certiorari denied, 242 U. S. 646; *Warring* v. *Huff*, 122 F. 2d 641 (C. A. D. C.), certiorari denied, 314 U. S. 678.[28]

A contemnor has never enjoyed the full bundle of constitutional rights ordinarily enjoyed by one charged with a "crime". "[C]ontempt proceedings are *sui generis* and should be treated as such in their practical incidence. They are not to be circumscribed

[28] Penalty aside, many contempts involve some degree of moral dereliction. Cf. *District of Columbia* v. *Colts*, 282 U. S. 63, 73, where the crime of reckless driving was subject to a fine of $100 and imprisonment of not more than thirty days, yet the Court held that jury trial was required since the offense was "*malum in se*."

[29] In the *Warring* case, Judge (later Chief Justice) Vinson stated aptly at 641: "* * * we see no advantage in rehashing the discussions on whether criminal contempt is *sui generis*, offense, crime, or felony. Criminal contempts are criminal contempts: some of the procedural and substantive law applied to criminal contempts is as though they were crimes; and some of it is not."

by procedural formalities, or by traditional limitations of what are ordinarily called crimes, except insofar as due process of law and the other standards of decency and fairness in the administration of federal justice may require." *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 609 (dissenting opinion of Mr. Justice Frankfurter).[31] In particular, the constitutional strictures "as to modes of accusation and methods of trial" have never been deemed binding in contempt cases in this country. *Ex parte Hudgings*, 249 U. S. 378, 383. This has been so, historically, because the courts have recognized that the power of summary punishment is essential to their self-preservation, so that they can "restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power." *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419.

"While contempt may be an offense against the law and subject to appropriate punishment," this Court declared in *Myers v. United States*, *supra*, 264 U. S. at 104–105, and repeated in *Blackmer v. United States*, *supra*, 284 U. S. at 440, "certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding."[32] Accordingly, trial of contempts by the courts does not violate Article III, Section 2, clause 3 of the Constitu-

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[31] The proposition stated in the quotation was not a point of disagreement with the Court's majority.

[32] It is notable that this categorical statement reflected, in both instances, the opinion of a unanimous Court.

tion (*infra*, p. 82), declaring that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," or the provision of the Sixth Amendment (*infra*, p. 82) guaranteeing to the accused in "all criminal prosecutions" the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed." *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 489; *In re Debs*, 158 U. S. 564, 594-596. "[T]he power of a court to make an order," as this Court observed in the *Debs* case, *supra*, "carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court" (158 U. S. at 594).

On this same issue—the question of the right to a trial by jury in a contempt proceeding—Chief Judge Cranch, in *Ex parte Burr*, 4 Fed. Cas. 791, 797 (C. C., Dist. of Col.), observed:

> By the literal construction of the constitution, all crimes, (except in cases of impeachment), even those committed in the land and naval service, must be tried by jury; yet, in practice, these are tried by courts-martial, without a jury. But whatever may be the law as to cases arising in the land and naval service,

[20] The few instances in which a contemnor charged with disobedience of a court order is entitled to a jury trial are the products of statute. *E. g.*, Sections 21-22 of the Clayton Act (now 18 U. S. C. 402) (see *supra*, pp. 44-53); Section 11 of the Norris-LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 72; now 18 U. S. C. 3692); Public Law 85-315, Section 151, enacted September 9, 1957.

cases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment. From time immemorial the courts of England, and from the first settlement of this country the courts here have claimed and exercised the power to punish contempts in a summary manner. * * * Such being the universal practice and sentiment upon the subject, it cannot be supposed that the makers of the constitution meant to include it in the number of crimes entitled to trial by jury; and that they did not may be fairly argued from the constructive exposition of the clause of the constitution given by the first congress which sat under its authority. Many members of the convention were members of the first congress, and it cannot be believed that they would have silently acquiesced in so palpable a violation of the then recent constitution, as would have been contained in the seventeenth section of the judiciary act of 1789 (1 Stat. 73),—which authorizes all the courts of the United States "to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same,"—if their construction of the constitution had been that which has, in this case, been contended for at the bar.[*]

[*] Judge Cranch's views on this subject are, perhaps, entitled to particular weight since he took his place on the federal bench (a position which he occupied with distinction for some fifty-four years) in the very early days of the Republic (1801).

By the same token, and because of the same considerations, a contempt is not, and has never been, considered, a "crime" within the meaning of the Fifth Amendment. "In brief," as this Court said in *In re Debs*, *supra*, "a court enforcing obedience to its orders by proceedings for contempt, is not executing 'the criminal laws of the land * * *'" (158 U. S. at 596). Rather, it is protecting the integrity of its own processes and orders. *Eilenbecker* v. *Plymouth County*, *supra*, 134 U. S. at 36. "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *In re Debs*, *supra*, 158 U. S. at 595. See also *Michaelson* v. *United States*, 266 U. S. 42, 65–67. This rationale is no less applicable to a grand jury than a petit jury. Yet, as Judge Hand points out in the opinion below (R. 70), the necessary consequence of adopting petitioners' view would be the anomaly that contempt proceedings, if the punishment may exceed a year's imprisonment, must be begun by a grand jury, although such proceedings need not be tried to a petit jury. The difficulties inherent in such a result—both logical and practical—demonstrate the lack of merit in the constitutional innovation suggested by petitioners.

2. Petitioners argue, however, that the admittedly settled rule holding criminal contempts not to be "criminal prosecutions" within the jury-trial requirement of the Sixth Amendment "rests on an historical error," and that "the consequences of the error should not be extended to other constitutional guarantees" (Br. 38).

But this claim of historical error, *in the generalized form in which petitioners state it*, is, itself, erroneous. While there is basis for saying that constructive contempts (*e. g.*, libels upon the court) committed by strangers to a proceeding were not tried to the court in early (pre-eighteenth century) times, it appears that disobedience of the writs and orders of the King's courts (as, also, contempts in the face of the court and contempts by officers of the court) were punishable, from an early date, without indictment or jury trial.

As authority for their statement that the power of a court to punish criminal contempt without according the accused a jury trial is based on "historical error," petitioners cite (Br. 38, fn. 46) *The History of Contempt of Court* (1927), the noted study by Sir John Charles Fox, and an article by Mr. Justice (then Professor) Frankfurter and Professor Landis entitled *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010 (1924), in the course of which latter work the authors summarize (at pp. 1042–1047) Fox's findings as previously developed in a series of essays which appeared in the *Law Quarterly Review*.[35] In the cited work

[35] See *The King* v. *Almon* (in two Parts), 24 Law Q. Rev. 184, 266 (1908); *The Summary Process to Punish Contempt* (in two Parts), 25 Law Q. Rev. 238, 354 (1909); *Eccentricities of the Law of Contempt of Court*, 36 Law. Q. Rev. 394 (1920); *The Nature of Contempt of Court*, 37 Law Q. Rev. 191 (1921); *The Practice in Contempt of Court Cases*, 38 Law Q. Rev. 185 (1922); *The Writ of Attachment*, 40 Law Q. Rev. 43 (1924). Fox's subsequent work, *The History of Contempt of Court* (1927), to which peti-

of Fox (see also his *The King* v. *Almon* (in two Parts), 24 Law Q. Rev. 184, 266 (1908)), that author demonstrates, by means of a painstaking review of early English authorities, that a statement by Mr. Justice Wilmot, in the draft of an undelivered opinion in *The King* v. *Almon* (1765),[35] to the effect that the issuance of "attachments" by which was meant conviction "upon examination without a trial by jury" (see Fox's *History* at p. 56)—"by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law" (*id.*, p. 8), was historically inaccurate, in that prior to about 1721 such contempts were tried in England in the "ordinary course of law," *i. e.*, "after trial by a jury" (*id.*, *passim*, especially pp. 26–27, 39, 49–50, 53–54, 116–117). Notwithstanding the lack of historical basis for Wilmot's broad generalization, as Fox points out, beginning in 1821, when it was cited in *Rex* v. *Clement*, 4 Barn. & Ald. 218, it "became the law of the land, and it was confirmed and estab-

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tioners refer (Br. 38, fn. 46), is, as he explains in the Preface (p. vii), "founded to some extent upon" these articles.

[35] The case involved an attachment for criminal contempt against John Almon, a bookseller, for publishing a libel against Lord Chief Justice Mansfield. Shortly before the judgment in favor of granting the attachment (which implied conviction without a jury trial; see Fox, *op. cit.*, p. 56) was about to be delivered, a defect in the style of the action was discovered, and the proceeding under the particular rule *nisi* had to be abandoned. Thereafter, a change of ministry ensuing, the proceeding was abandoned permanently. The undelivered opinion of Mr. Justice Wilmot was published some thirty-seven years later, in 1802, after the Justice's death, by his son as part of a compilation of the Justice's writings, known as Wilmot's *Notes* (Fox, *op. cit.*, pp. 5–6).

lished by a line of succeeding cases extending down to the present century" (Fox, *op. cit.*, pp. 28–29).

Fox makes clear in his writings, however, that his conclusions as to Wilmot's "historical error" do not apply to all classes of contempt, but, on the contrary, to certain types only, particularly those "committed by strangers out of court or in the presence, but not in the actual view, of the Court," and, even more especially, such so-called "constructive contempts" as libelous publications criticizing courts or judges (*op. cit.*, pp. 42, 116–117). "All contempts committed in the actual view of the Court," on the other hand, "and contempts by officers of justice, whether committed in or out of court, were tried summarily by the Court without a jury" (*id.*, p. 116).[37] Cf. Frankfurter and Landis, *op. cit. supra*, 37 Harv. L. Rev. at 1042. And, more important for present purposes, Fox indicates that the *direct disobedience of court process or orders*—the kind of contempt involved in the instant

[37] Fox acknowledges that there were instances at very early common law of "contempts committed in the face of the Court" which were "dealt with according to the course of the common law by impanelling a jury *instanter*," but disputes the conclusion of Solly-Flood, another historian of the subject, that "the punishment by summary process of contempt committed by a stranger *in facie* was not resorted to till long after the death of Henry IV" (*op. cit.*, p. 50). "Although these cases prove that some contempts *in facie* were punished in the ordinary course of law," Fox observes, "they do not by themselves disprove the existence of the power to punish certain contempts of this nature summarily. I think that Solly-Flood's contention goes too far, and that where the contempt was committed in the actual view of the Court, the Court committed summarily * * *" (*ibid.*).

case—had been summarily punishable from early times. See *id.*, *passim*, particularly pp. 7, 36, 108–110; compare Beale, quoted *supra*, pp. 32–33. In *The King v. Almon* (Part I), 24 Law Q. Rev. 184, 188 (1908), he states: "There can be no question that obedience to the King's writ was enforced by attachment from time immemorial, and in later times this remedy was extended to enforce a rule of the Court." [28] In Part II of the same article (24 Law Q. Rev. at 276–277), he observes that "[o]riginally the superior courts of common law had jurisdiction to punish disobedience to the King's writ summarily by fine and imprisonment upon attachment, and probably also a disciplinary jurisdiction over their own officers exercisable summarily"; and that the lower common law courts gradually established a summary contempt jurisdiction "in or after the Tudor period," though "this did not extend to libels on the Court or judges which were still punished by indictment or by proceedings in the Star Chamber." Wilmot's error (*id.*, pp. 277–278) was "in supposing that a summary process was originally applied otherwise than to enforce the King's writs or to preserve discipline amongst the officers of the Court."

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[28] A footnote to this sentence cites a seventeenth century case which applied the writ of attachment to enforce an award of arbitration.

Compare the observation of this Court in the *Debs* case (quoted at p. 67, *supra*): "[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the *inquiry as to the question of disobedience has been, from time immemorial, the special function of the court.*" (158 U. S. at 594; emphasis added.)

Thus, at least with respect to the kind of contempt involved at bar—disobedience of court process or orders by a party to the proceeding—there is no basis in fact for the suggestion that punishment by the court itself, without the intervention of a jury, was an eighteenth century innovation in English law."

Wilmot's error—his thesis that immemorial usage (and not merely eighteenth century practice) gave foundation for the trial of constructive contempts by the court—is not a live question in the federal courts; the Act of 1831, as interpreted in *Nye* v. *United States*, 313 U. S. 33, 49, put it beyond the judicial power to

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[39] Of course, even if the "error" of Mr. Justice Wilmot had in fact affected contempts consisting of disobedience of court orders (which, as we have shown, it did not), the fact could hardly be relevant. As noted in Frankfurter and Landis, *op. cit., supra*, 37 Harv. L. Rev. at 1046, note 128, "there is ample evidence that, as a result of private communication between Wilmot and Blackstone, Wilmot's views of 1765 found their way, 'both in phrase and matter,' into the fourth volume of the famous Commentaries published in 1769 (4 BL. COMM., c. 20, § III), and, through them, potently affected the current of Anglo-American law [citing Fox, *The Summary Process to Punish Contempt*, 25 Law Q. Rev. 238, 247, 253-254 (*k*); see also his *History*, at pp. 18, 21]. Blackstone becomes the great reliance for 'immemorial usage' in English and American opinions, until Wilmot himself appears in print. As the amazing circulation of the Commentaries in the Colonies and the early American reports show, Blackstone had an 'overshadowing influence in the construction of American law,' I Hammond, BL. COMM., viii-x. Our law of contempt thus decisively derives from Wilmot *via* Blackstone." In short, since it is certain that the framers of the Constitution were thoroughly conversant with Blackstone, his views and statements are an accurate measure of their understanding of the status of contempt proceedings.

punish as a contempt an obstruction of justice taking place outside the immediate vicinity of the court." But the same Act of 1831, like its successors, fully preserves the power to punish as a contempt the disobedience of court process and orders. This power, we submit, has historical support not only in the

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* By this interpretation, the Court achieved what may fairly be described as the central thesis of Fox's work. Note Fox's criticism of the earlier *Toledo Newspaper* decision, overruled on this point by *Nye*, *History*, *op. cit.*, p. 211, *et seq.* Fox himself, it should be observed, did not suppose that a similar change in England could come about without an act of Parliament, since the practice of trying constructive contempts to the court, even though not based on immemorial usage, was established more than two hundred years ago. Thus, he states (*The Summary Process to Punish Contempt (Part II)*, 25 Law. Q. Rev. 354, 371) "that Parliament alone can effect an alteration."

In fact, Parliament has not done what Congress did. Contempts by publication and other forms of constructive contempt are still punishable by attachment of the offender and hearing before a judge. For recent illustrations, see the opinions of Lord Goddard, C. J., in *Regina* v. *Evening Standard Co.*, 1 All E. R. 1026 (Q. B., 1954) and *Rex* v. *Bolam*, 93 Sol. J. 220 (K. B., 1949) (imposing a three months' sentence upon the editor and a £10,000 fine upon the proprietors of the *Daily Mirror*). Wilful disobedience of a court order is, of course, triable in the same manner. "Disobedience by witnesses or parties to lawful orders of a superior Court of record may be dealt with by the Court summarily by committal or attachment for contempt of Court." 1 Russell, *Law of Crimes* (7th ed., 1910) 512. This is not to say that there is no alternate mode of proceeding in England. There is concurrent jurisdiction to try as indictable offenses most acts which also constitute contempt. Thus, "[d]isobedience to orders of Courts of record is punishable on indictment as a misdemeanor, but is usually dealt with summarily as for contempt." Archbold, *Criminal Pleading, Evidence and Practice* (31st ed., 1913), pp. 1212. And see *id.*, pp. 1206–1208; 8 Halsbury, *Laws of England* (3rd ed., 1954) : 3–4.

eighteenth century practice known to the framers, but also in the practice at early common law.

IV

PETITIONERS' SENTENCES OF THREE YEARS' IMPRISONMENT WERE NOT EXCESSIVE IN THE LIGHT OF THEIR DELIBERATE AND CONTINUED DEFIANCE OF THE AUTHORITY OF THE COURT FOR MORE THAN FOUR YEARS.

Petitioners' remaining contention (Br. 40–41)—that the trial court abused its discretion in sentencing them to terms of imprisonment for three years—is likewise without merit.

Unlike the judgment in a civil contempt proceeding, where the conditional fine or period of incarceration is imposed merely to coerce compliance with the court's mandate, a sentence for criminal contempt is punitive in nature and is imposed for the purpose of vindicating the authority of the court. *United States* v. *United Mine Workers*, 330 U. S. 258, 302. Protection of the integrity of the judicial process requires that one who deliberately defies the authority of a court be punished proportionately to the gravity and duration of his calculated resistance to that authority.[41]

Mr. Justice Lamar, in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, expressed the rationale of punishment for criminal contempt when he said, "If a party can make himself a judge of the validity of

[41] "It is not the right of the courts only, but it is the right of the people, to cause their courts to be treated with respect. It is the public interest, and not the personal pride of the judges * * * which claims this power for the courts." *Ex parte Burr*, 4 Fed. Cas. 791, 797 (C. C., Dist. of Col.).

orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery" (at 450). This observation fits the present case. After taking advantage of every procedural remedy and every avenue of appeal permitted defendants accused of crime under our system of jurisprudence, and after their convictions had been sustained after full hearing by this Court, petitioners elected to take the law into their own hands and to ignore the final order that they surrender to start serving their sentences. Petitioners' conduct in absconding and remaining in flagrant violation of the order to surrender for commitment for over four years clearly required punishment which would effectively demonstrate that such efforts to make a mockery of the judicial process would not be tolerated.

This Court has held that the trial court, in imposing sentence for a criminal contempt, may properly take into consideration the extent of the wilful defiance of the court's order, the seriousness of the consequences of the contumacious behavior, and the importance of deterring such acts in the future. *United States* v. *United Mine Workers, supra,* 330 U. S. at 303. "Because of the nature of these standards," as the Court further remarked, "great reliance must be placed upon the discretion of the trial judge" (*ibid.*).

In *Huffman* v. *United States,* 148 F. 2d 943, 944 (C. A. 10), the court, commenting on the provisions of the Criminal Code which make criminal contempt

punishable by fine or imprisonment in the court's discretion, correctly noted: "There is nothing in the statute [now 18 U. S. C. 401] which limits the punishment, except the reasonable discretion of the court. And since the matter rests in the sound judicial discretion of the court, an order imposing punishment on a contemnor will not be disturbed on appeal for being unreasonable unless the discretion has been grossly abused".[42]

Comparison to other cases of criminal contempt in which defendants were sentenced to imprisonment for two years or longer discloses no instance of wilful disobedience more flagrant and persistent. In *Hill* v. *United States ex rel. Weiner*, 300 U. S. 105, a two-year sentence was imposed for violation of an injunction issued under the Sherman Act. In *Reich* v. *United States*, 239 F. 2d 134 (C. A. 1), certiorari denied, 352 U. S. 1004, there was a similar sentence for contempt of an injunction issued under the Federal Food, Drug, and Cosmetic Act.[43] In *Conley* v. *United States*, 59 F. 2d 929 (C. A. 8), a two-year term was sustained against a defendant who offered to "fix" a criminal case and procure its dismissal. In the unreported case of *United States* v. *Miranda*, S. D. N. Y., No. C144–167, a three-year sentence was imposed for refusal to answer questions of the court.

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[42] See also *In re Sobel*, 242 Fed. 487, 489 (C. A. 2); *Miller* v. *Zaharias*, 168 F. 2d 1, 3 (C. A. 7); *MacInnis* v. *United States*, 191 F. 2d 157 (C. A. 9).

[43] In that case, the finding of violation was by a jury, pursuant to the defendant's demand for such trial under Section 302 (b) of the Act (21 U. S. C. 332 (b)).

In *United States* v. *Phillips*, also unreported (W. D. Wash.), pending on appeal to the Ninth Circuit (No. 14323), a three-year sentence was imposed against a witness for refusing to answer questions on cross-examination. In *Yates* v. *United States*, 107 F. Supp. 412 (S. D. Cal.), reversed on other grounds, 227 F. 2d 848 (C. A. 9), another three-year sentence was imposed, likewise for refusing to answer questions on cross-examination. In *Pendergast* v. *United States*, 128 F. 2d 676 (C. A. 8), reversed on other grounds, 317 U. S. 412, a two-year sentence was imposed for using political influence and bribery to affect the outcome of litigation. And in *United States* v. *Pontillo*, S. D. N. Y., No. C151–113, a four-year sentence was imposed against a defendant who, after receiving a reduction in sentence on his promise to cooperate in another case, refused to testify."

Petitioners, by their own statements, showed that their flight was motivated by a desire to show resistance and to publicize their cause. After remaining in hiding and in open defiance of the courts for more than four years, they apparently determined that the time for surrender was propitious (*supra*, pp. 8–11). And when they did surrender, they did not do so in any spirit of contrition. On the contrary, they an-

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"This sentence was vacated shortly thereafter when the defendant changed his mind and testified.

To the list of cases cited in the preceding paragraph of the text, one may add the case of two witnesses who were recently sentenced in the Southern District of New York to five years each for refusing to testify at the trial of John Dioguardi. See *New York Times*, May 21, 1957, p. 1, col. 5; May 25, 1957, p. 1, col. 2.

nounced their surrender to the press in advance, using the occasion to renew their attacks on the courts which had convicted them. We submit that, in the light of all of these circumstances, petitioners' conduct was of such a nature, and lasted for such an extended period, that the three-year sentences which they received were within the allowable discretion of the District Court.

Congress, in 1954, enacted a statute which made bail-jumping a statutory offense.[48] Under that Act, where the defendant who jumps bail has been charged with a felony, or where he is on bail pending appeal after conviction of any offense, penalties of up to a $5,000 fine, or five years' imprisonment, or both, are authorized. Since the statute was designed to apply to just such situations as that here involved, irrespective of whether the absconder was specifically aware of an order requiring him to surrender, the penalty imposed here can hardly be deemed excessive under these statutory standards.

In *United States* v. *Hall, supra,* 198 F. 2d 726, and *United States* v. *Thompson, supra,* 214 F. 2d 545, certiorari denied, 348 U. S. 841, the defendants violated the same court order which petitioners violated. Hall was a fugitive for only three months before he was apprehended, yet the three-year sentence there imposed was not deemed to be beyond the court's proper discretion. Thompson remained at large for twenty-six months before being captured, and a four-year term was sustained as likewise within the per-

[48] 18 U. S. C. 3146, added by the Act of August 20, 1954, c. 772, Section 1, 68 Stat. 747 (see *infra*, pp. 83–84).

missible scope of the court's discretion. An attempt is made here to distinguish petitioners' cases from those of Hall and Thompson on the ground that, whereas the latter were apprehended, petitioners surrendered (Br. 41). In light of the duration of the contempt of the petitioners and the circumstances surrounding its ultimate termination, this effort is unpersuasive.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Article III, Section 2, clause 3 of the Constitution provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

18 U. S. C. 401 provides:

> *§ 401. Power of court.*
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402 provides:

> *§ 402. Contempts constituting crimes.*
>
> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the Dis-

trict of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title* and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U. S. C. 3146, added by the Act of August 20, 1954, c. 772, § 1, 68 Stat. 747 (see 18 U. S. C., Supp. IV), provides:

§ 3146. Jumping bail.

Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to sur-

*Section 3691 provides for a jury trial (at the accused's option) for acts of contempt of the kind described in Section 402.

render himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

The Act of October 15, 1914, c. 323, 38 Stat. 730, 738–740 (popularly known as the Clayton Act), provided in pertinent part:

* * * * *

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may

issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment,

or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

* * * * * *

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

* * * * * *

Rule 7 (a) of the Federal Rules of Criminal Procedure provides:

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * * * *

Rule 42 of the Federal Rules of Criminal Procedure provides:

RULE 42. CRIMINAL CONTEMPT

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court

for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge; that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

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